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Supreme Court, U.S.
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In The
UNITED STATES SUPREME COURT

DANIEL L. MILES,
PETITIONER

v.

DALE E. KLEIN, SUCCESSOR TO NILS J. DIAZ, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR A WRIT OF
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION OF A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

1. Whether the effect of the Court of Appeal's decision of affirmance, as well as the District Court's final Judgment of dismissal, in establishing or upholding slavery conflicts with the first section of the Thirteenth Amendment of the United States Constitution.

2. Due to the nature and extent of this case, whether the panel Majority of the Court of Appeals purposefully overlooked the fact that the District Court's dismissal of the case resulted in its failure to consider the written motion for class certification pursuant first and pursuant to F.R.C.P. Rule 23.

3. Due to the nature and extent of this case, whether the panel Majority of the Court of Appeals purposefully overlooked the fact that Petitioner did not have a significant incentive to bring or proceed as an individual action for the adjudication of his individual claims in the absence of a class action.

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DECISIONS BELOW

On December 18, 2007, the Court of Appeals for the Seventh Circuit denied motion for stay pending a writ of certiorari to this Court. Appendix (App. 1a). On December 4, 2007, The Court of Appeals for the Seventh Circuit denied *en banc* rehearing. (App. 2a). The decision of the United States Court of Appeals for the Seventh Circuit is unpublished and is reproduced at App. 3a-7a. The decision of the United States District Court for the Northern District of Illinois, Eastern Division is unpublished and is reproduced at App. 13a-14a.

JURISDICTION

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. The District Court had jurisdiction under 28 U. S.C. § 1331, 1343(a) (4), 2201, and 2002, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000(e) et seq. as amended, the Civil Rights Act of 1991, and 42 U. S.C. § 2000(e)-5(f) (3). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Thirteenth Amendment's first section, in relevant part, provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Rule 23 of the Federal Rules of Civil Procedure, in relevant part, provides:

> **Rule 23. Class Actions**
>
> (a) Prerequisites.
>
> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable,
>
> (2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) Types of Class Actions.

A class action may be maintained if Rule 23(a) is satisfied and if:

*****

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

(1) Certification Order.

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

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(g) Class Counsel.

(1) Appointing Class Counsel.

Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) Standard for Appointing Class Counsel.

When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) Interim Counsel.

The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, provides in part:

SEC. 2000e-2. *[Section 703]*

(a) It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

*****

SEC. 2000e-16. *[Section 717]*

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5 *[United States Code]*, in executive

agencies *[other than the General Accounting Office]* as defined in section 105 of title 5 *[United States Code]* (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

*****

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the "Constitution and statutes..."

BACKGROUND AND STATEMENT OF CASE

The Underlying Litigation in the District Court

On August 11, 2006, Petitioner filed a class-action discrimination complaint, on own behalf and on behalf of others as a class, in the United States District Court for the Northern District of Illinois, Eastern Division, alleging, among others, that Respondent, Dale E. Klein, successor to Nils J. Diaz, Chairman, U.S. Nuclear Regulatory Commission, has violated Title VII of the Civil Rights Act of 1964, as amended, by engaging in a pattern or practice of race and sex discrimination. The filed class-action complaint included a written motion for class certification pursuant to Rule 23. (App. 106a-123a).

1. During the initial status hearing held on October 19, 2006, Parties were supposed to report on the status of a possible settlement. (App. 9a). However, no offer of a settlement was discussed prior to or during the hearing. Petitioner indicated to the District Judge that Counsel for Respondent had not filed an answer to the complaint. The District Judge granted Counsel for Respondent leave to file an answer. (App. 10a). Although Counsel for Respondent expressed intention to file a motion to dismiss, an answer denying nearly all allegations in the complaint was filed instead. (App. 11a); (App. 124a-147a).

2. During a status hearing held on December 6, 2006, Petitioner directed the District Judge's attention to Petitioner's complaint pertaining to the written statements asserted for class certification pursuant to Fed. R. Civ. P. 23. As conveyed to Petitioner, the District Judge said that Petitioner should proceed first with the individual claims and then with the class action claims - in steps as the Judge stated - or he would have to dismiss the case. Petitioner sensed that the District Judge's statements were likewise the consensus of Counsel for Respondent. Rather than proceed first with Petitioner's individual claims or risk the case being dismissed, Petitioner requested and was granted leave to try again to retain an attorney. (App. 12a).

3. During a status hearing held on January 17, 2007, Petitioner informed the District Judge of Petitioner's unsuccessful attempt to retain an attorney due to the nature of the case. In spite of Petitioner's statement, the District Judge expressed intention to proceed with discovery (in other words, to proceed with discovery relating to Petitioner's individual claims as opposed to discovery relating to class certification or the class claims). Here it must be emphasized that the Judge only expressed his intention to proceed with discovery but never issued or gave an order to do so. To the Judge, Petitioner stated that the lawsuit was filed as a class action and not as an individual action. Petitioner asked the Judge whether he would certify the action as a class action.

The Judge responded with a resounding 'no', and indicated, without any detail, that a rule of the Seventh Circuit was the reason for the denial. Petitioner stated that he did not see how the Court could proceed - that is, to proceed without class certification. The Judge asked Petitioner, what did he want to do? Petitioner responded that it was up to the Judge. The Judge dismissed case (dismissal with prejudice) and stated so in the final judgment, entered January 17, 2007, without making any of class determinations (numerosity, commonality, typicality, adequacy of representation, predominance of common issues, and etc.) pursuant to Fed. R. Civ. P. 23. (App. 13a-14a). On March 14, 2007, a notice of appeal was filed in the District Court.

The Underlying Litigation in the Court of Appeals

On April 24, 2007, Petitioner filed his primary brief in the Court of Appeals. (App. 48a-75a). On May 11 2007, Respondent filed a motion as United States' Motion for Summary Affirmance or To Reset Briefing Schedule instead of a response brief. A reply motion was subsequently filed by Petitioner on May 22, 2007. The Judges initially assigned to this appeal granted only the motion to reset briefing schedule. (App. 8a). Worthy of notice, since the filing of the notice of appeal and before the filing of his primary brief, Petitioner made two personal appearances before and several phone calls to the District Court Reporter with no avail in his attempts to receive the

transcripts of the District Court proceedings. Approximately 10 minutes after the filing of his primary brief, Petitioner received a cell-phone call informing him that transcripts were ready to be received. The transcripts received are tainted. The transcripts do not correctly reflect the statements actually made during the status hearings held in the District Court (the transcripts reveal modified, omitted, and unexpressed statements).

On July 6, 2007, Respondent filed a response brief. (App. 76a-91a). A reply brief was subsequently filed by Petitioner on July 23, 2007. (App. 92a-101a). On October 11, 2007, the panel Majority affirmed the District Court's denial of class certification and its dismissal of the case. (App. 3a-7a).

REASONS FOR GRANTING THE PETITION

1. The panel Majority's decision of affirmance, as well as the District Court's final judgment of dismissal, in establishing or upholding slavery conflicts with the first section of the Thirteenth Amendment of the United States Constitution.

Following the Civil War the Thirteenth Amendment to the United States Constitution was adopted, which have become an integral part of that instrument as a supreme law of the land, binding upon all the states and all the people, as well as upon every branch of the federal

government. See *Hodges v. United States*, 203 U.S. 1, 26 (1906). It has long been settled that the Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). In relevant part, the Thirteenth Amendment's first section provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"This Amendment...is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Amendment "has a reflex character also, establishing and decreeing (or authoritatively ordering) universal civil... freedom throughout the United States." *Id.* at 20. In addition, the Amendment has an "equal protection" component that proscribes, except as a punishment for crime, the unequal treatment of all African Americans, and other minorities, in the exercise of their natural rights, and that mandates that both the state and

federal government take affirmative actions to ensure the free exercise of those natural rights. Cf. *Hodges v. United States*, 203 U.S. 1, 17 (1906); *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989); see also Congressional Globe, 38th Cong., 1st Sess. 1482 (1864). "The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery." *Slaughter-House Cases*, 83 U.S. 36, 69 (1872). "Slavery implies involuntary servitude,-a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services." *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896). The plain intention of the Thirteenth Amendment was "to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey v. State of Alabama*, 219 U.S. 219, 241 (1911). Undeniably, the Thirteenth Amendment provides individuals with rights, among others, to be free from slavery and involuntary servitude, the enjoyment or deprivation of which

constitutes the essential distinction between freedom and slavery.

With the foregoing statements in mind, it is clear that the language of the filed class-action complaint demonstrates not only Respondent's pattern or practice of race and sex discrimination since January 19, 1975 to present, but also, during the same period of time, Respondent's conduct in restraining the Black male class from occupations of gain by compulsory labor and services being directed against the will of class member for the benefit of class member of the white male class. Clearly, the lack of power or freedom of class member of the Black male class to make or perform contracts is being demonstrated from the language of said complaint that also includes demonstrating the restriction on such class member's freedom of action by unlawful restraint. "One of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts." *Hodges v. United States*, 203 U.S. 1, 17 (1906); see *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993); see also *City of Memphis v. Greene*, 451 U.S. 100 (1981). It is equally clear from the language of said complaint that class member of the Black male class is being continually compelled by force to submit to and comply with the prescribed or dictated

course of action by Respondent for the benefit of class member of the white male class. Petitioner must point out that the course of action by Respondent is also alleged as being in violation of Title VII. The long-continued and coerced services of submission and compliance have been, without any doubt, akin to African slavery, and there have been no reasonable means of escape and no choice except to remain in the involuntary services. Cf. *United States v. Shackney*, 333 F.2d 475; *United States v. Kozminski*, 487 U.S. 931, 945 (1988); see also *Butler v. Perry*, 240 U.S. 328, 332 (1916) ("[T]he term involuntary servitude was intended to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."). In view of the foregoing, it is clear that

> "Black males, including Petitioner, had and have been, and, as a result of the panel Majority's decision of affirmance, are being continually and purposefully subjected to and held in a condition of slavery in contravention of the Thirteenth Amendment's first section; and occurring concurrently, the deprivation of the rights to be free from slavery and involuntary servitude."

Premised on purposeful class-based discrimination, the aforementioned demonstrates a clear showing of Respondent acting unconstitutionally. The belief of

Petitioner is that the result of the panel Majority's decision of affirmance effectively affirmed the continuation of such subjection and its oppression. Likewise, the action taken thus far in this case has vividly reminded Petitioner of the following: 1) each member becomes or acts as the agent of every other member; 2) the agreement was a tacit understanding, created by a long course of conduct and executed in the same way, and 3) not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. As Petitioner has indicated in his filed reply brief, "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." O'Shea v. Littleton, 414 US 488, 496 (1974). Furthermore, the nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme law. As such, Petitioner believes that the Thirteenth Amendment's first section nullifies both the panel Majority's decision of affirmance and the District Court's final judgment of dismissal with prejudice.

2. The panel Majority purposefully overlooked the following points of fact and law:

A. Due to the nature and extent of this case, the panel Majority overlooked the fact that the District Court's dismissal of the case resulted in its failure to consider the

written motion for class certification first and pursuant to Rule 23.

As argued in Petitioner's primary and reply briefs filed in the Court of Appeals, the District Court dismissed the case sua sponte, and its dismissal for Petitioner's lack of desire to pursue the case can be fairly regarded as a "dismissal for want of prosecution." Rule 41(b) of the Federal Rules of Civil Procedure addresses the involuntary dismissal of an action and claim and provides:

> "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Given that Petitioner had neither filed a notice or stipulation of dismissal nor made a request for dismissal under Fed. R. Civ. P. 41 (a)(1) or (2), and given that it was not otherwise specified, the District Court's dismissal for

want of prosecution operated as an "adjudication upon the merits." The Seventh Circuit stated in the case of *In re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995): "Dismissal for want of prosecution is an undeniably harsh sanction, having the procedural effect of an adjudication on the merits against the plaintiff. See FED. R. CIV. P. 41(b). This severity requires that district courts resort to dismissal only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailable." GCIU Employer Retirement Fund v. Chicago Tribune, 8 F.3d 1195, 1199 (7th Cir. 1993) (quoting Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d1058, 1061 (7th Cir. 1989)). See also Northern District Court of Illinois Local Rule 41.1. It is inescapably clear that there is nothing in the record to show bad faith, failure, or a lack of diligence to meet deadlines or any contumacious conduct by Plaintiff-Appellant.

As discussed above in regard to the District Judge's statements urging Petitioner to proceed first with his individual claims and then with the class claims - in steps as the Judge stated - or he would have to dismiss the case, the Seventh Circuit stated in the case of *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001): "A court may not say something like "let's resolve the merits first and worry about the class later...or I'm not going to

certify a class unless I think that the plaintiffs will prevail." As a result of the District Court's dismissal, the merits of the case were resolved first and irrespective of Petitioner's written motion for class certification pursuant to Rule 23. A "determination of the propriety of class certification should not turn on likelihood of success on the merits." *Payton v. County of Kane,* 308 F.3d 673, 677 (7th Cir. 2002).

Even assuming that the dismissal was for failure to prosecute, although Petitioner argued otherwise based on the statements in the District Court's final judgment order, the Seventh Circuit stated in the case of *Kruger v. Apfel,* 214 F.3d 784 (7th Cir. 2000), a case which involved an issue of failure to prosecute: "We will find an abuse of discretion where the district court commits an error of law, *Khan v. Gallitano,* 180 F.3d 829, 837 (7th Cir. 1999), or fails to consider an essential factor, see *Robyns v. Reliance Standard Life Insurance Co.*, 130 F.3d 1231, 1236 (7th Cir.1997)." The District Court failed to consider an essential factor in this case, namely, whether Petitioner's written motion for class certification satisfied all four requirements of Rule 23(a), and at least one of the categories of Rule 23(b). In the case of *Payton v. Kane County*, 308 F.3d 673, 680 (7th Cir. 2002), the Seventh Circuit explained: "....our analysis with the question of class certification, mindful of the Supreme Court's directive to consider issues of class certification prior to issues of

standing. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999): 'the class certification issues are...logically antecedent to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing. Thus the issue about Rule 23 certification should be treated first.' *Id.* at 831. This involves defining the class and assessing whether the proposed class representatives can satisfy all four requirements of Rule 23(a), and at least one of the categories of Rule 23(b)." To put it bluntly, the District Court did not follow these procedures. Nonetheless, as the Supreme Court stated in *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977): "Departures from the normal procedural sequence also might afford evidence that improper purposes are playing a role. Substantive departures too may be relevant, particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached."

B. Due to the nature and extent of this case, the panel Majority overlooked the fact that Petitioner did not have a significant incentive to bring or proceed as an individual action for the adjudication of his individual claims in the absence of a class action.

Due to the forty-five day time limit being imposed by 29 C.F.R. § 1614.105 (a)(1) for allegations of discrimination and thus small recoveries of damages, "the plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually..." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985). "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences." *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980). As the Seventh Circuit stated in the case of *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 344 (7th Cir. 1997): "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his...

rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's ....labor." On the other hand, "...impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain, even though it will cause greater trouble by and by. The successive contracts, each for a longer term than the last, are the inevitable, and must be taken to have been the contemplated, outcome of the [Respondent custom having the effect or force of law]." *United States v. Reynolds*, 235 U.S. 133, 150 (Holmes, J., concurring). Cf. *Monell v. Dep't of Social Services*, 436 U.S. 658, 690-91, n. 56 (1978).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: February 22, 2008

APPENDIX

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
December 18, 2007

By the Court:

DANIEL L. MILES,
Plaintiff-Appellant,
v.
DALE E. KLEIN, Chairman,
United States Nuclear Regulatory Commission,
Defendant-Appellee.

No. 07-1596

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 4351
Charles P. Kocoras,
Judge.

Upon consideration of the MOTION OF PLAINTIFF-APPELLANT FOR STAY PENDING A PETITION FOR WRIT OF CERTIORARI TO THE U.S. SUPREME COURT, filed on December 10, 2007, by counsel for the appellant,

IT IS ORDERED that the motion is DENIED. The mandate shall issue forthwith.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
December 4, 2007

Before

Hon. Richard A. Posner, *Circuit Judge*

Hon. Kenneth F. Ripple, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 07-1596

DANIEL L. MILES,
Plaintiff-Appellant,

v.

DALE E. KLEIN, Chairman, United States Nuclear Regulatory Commission,
Defendant -Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 06 C 4351
Charles P. Kocoras,
Judge.

ORDER

On November 21, 2007, plaintiff- appellant filed a petition for rehearing and petition for rehearing *en banc.* All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc.* The petition is therefore DENIED. The motion to correct the petition for rehearing *en banc is* also DENIED.

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted October 10, 2007*
Decided October 11, 2007

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

No. 07-1596

DANIEL L. MILES,
Plaintiff-Appellant,

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 06 C 4351

DALE E. KLEIN, Chairman,
United States Nuclear Regulatory Commission,
Defendant-Appellee.

Charles P. Kocoras,
Judge.

ORDER

Daniel Miles appeals from the denial of class certification and dismissal of his individual Title VII discrimination complaint against his employer, the United States Nuclear Regulatory Commission. *See* 42 U.S.C. §§ 2000e to 2000e-17. We affirm.

No. 07-1596

Miles, an African-American male, works as an Information Technology Specialist for the Nuclear Regulatory Commission in Lisle, Illinois. In December 2005 Miles filed a charge with the Equal Employment Opportunity Commission seeking to represent a class of African-American males who he claimed his employer had discriminated against on the basis of race and gender. After his petition for class certification was denied, Miles rejected the EEOC's offer to process his charge as an individual complaint. He instead filed suit in federal district court.

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*After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

In federal court, Miles again sought to represent a class of African-American males who he claimed were the victims of race and gender discrimination in hiring and promotions. The district court cautioned Miles, who was representing himself, not to seek class certification before developing the facts of his individual claim, but Miles insisted that he would only continue the case as a class action. The district court denied Miles's oral motion for class certification and, as promised, Miles refused to continue litigating his individual claim. In response, the court dismissed Miles's individual claim "for plaintiff's lack of desire to pursue this case."

On appeal Miles first argues that the district court should have certified a class with him as class representative *and* as class counsel. This contention is easily disposed of as it is well settled that a nonlawyer, such as Miles, cannot act as legal counsel for a class. *See, e.g., United States v. Ou,* 368 F.3d 773, 775 (7th Cir. 2004). Because the district court gave Miles more than enough time to hire a lawyer, denial of his oral motion for class certification was, therefore, not an abuse of discretion. *Payton v. County of Carroll,* 473 F.3d 845, 847 (7th Cir. 2007).

Miles also contends that the district court erred when it dismissed his individual claim of discrimination

due to Miles's "lack of desire to pursue" it. Under Federal Rule of Civil Procedure 41(b), a district court has the power to sua sponte dismiss a claim for failure to prosecute, and we will reverse such dismissals only if the district court abused its discretion. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 63033 (1962); *James v. McDonald's Corp.*, 417 F.3d 672, 681 (7th Cir. 2005). In this case the record is plain that Miles did not wish to continue prosecuting his case after class certification was denied. Miles's contention that the record does not demonstrate the type of extreme conduct that would normally warrant dismissal for failure to prosecute is beside the point. As Miles explains in his reply brief, he sought and continues to seek "to litigate his individual claims of discrimination in a class-action context." But once the district court correctly denied that context to him, Miles refused to continue litigating his case. The district court warned Miles that it would dismiss based on his refusal to pursue his individual claim, *see Ball v. City of Chi.*, 2 F.3d 752, 755 (7th Cir. 1993), and Miles refused to change his position. The district court did not abuse its discretion when it took the only course of action that Miles left it and dismissed his individual claim.

Finally, Miles claims that the transcripts themselves are "tainted" and "do not correctly reflect the statements actually made during the status hearings held in the

District Court." But Miles does not identify which part of the transcripts he believes to be incorrect or any statements made at the hearings that were not included in the transcripts, so we could deem the argument waived. *Weinstein v. Schwartz,* 422 F.3d 476, 477 n.1 (7th Cir. 2005). Instead, we will address it more directly under Federal Rule of Appellate Procedure 10(e)(1), which states, "If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by that court and the record conformed accordingly." *See also* Cir. Rule 10(b); *United States v. Banks,* 405 F.3d 559, 567 (7th Cir. 2005). In other words, we are simply unable to consider in the first instance an argument that a certified transcript from the district court is "tainted." *See Zimmerman v. Chi. Bd. of Trade,* 360 F.3d 612, 622 (7th Cir. 2004); *see also* 28 U.S.C. § 753 (explaining that certified transcript is "deemed prima facie a correct statement of the testimony taken and proceedings had").

Accordingly, the judgment of the district court is AFFIRMED.

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604
June 8, 2007

Before

Hon. WILMAM J. BAUER, *Circuit Judge*

Hon. JOEL M. FLAUM, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

DANIEL L. MILES, Plaintiff-Appellant, No. 07-1596 v. DALE E. KLEIN, successor to Nils J. Diaz, Chairman, United States Nuclear Regulatory Commission, Defendant-Appellee.	Appeal from the United States District Court For the Northern District of Illinois, Eastern Division. No. 06 C 4351 Charles P. Kocoras, Judge.

Upon consideration of the UNITED STATES' MOTION FOR SUMMARY AFFIRMANCE OR TO RESET BRIEFING SCHEDULE, filed on May 11, 2007, by counsel for the appellee,

IT IS ORDERED that the motion is GRANTED but only to the extent that briefing will proceed as follows:

1. The brief of the appellee is due by July 6, 2007.

2. The reply brief of the appellant, if any, is due by July 23, 2007.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Daniel L Miles
Plaintiff,

v.

Case No.: 1:06-cv-04351

Honorable Charles P. Kocoras

Dale E. Klein
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, September 7, 2006:

MINUTE entry before Judge Charles P. Kocoras Status hearing set for 10/19/2006 at 09:30 AM. At the initial hearing, parties to report on the following: 1. Possibility of settlement. 2. If no possibility of settlement exists, the nature and length of discovery necessary to prepare the case for resolution. Plaintiff is directed to advise all other parties of the Court's action herein. Lead counsel for each party is required to attend the initial hearing. Mailed notice.

UNITED STATES DISTRICT COURT
For The Northern District of Illinois
Eastern Division

Daniel L Miles
Plaintiff,

v.

Case No.: 1:06-cv-04351

Honorable Charles P. Kocoras

Dale E. Klein
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Thursday, October 19, 2006:

MINUTE entry before Judge Charles P. Kocoras: Status hearing held on 10/19/2006. Defendants given to 11/2/2006 to file their motion to dismiss. Plaintiffs answer to said motion to dismiss is due 11/16/2006. Ruling set for 12/6/2006 at 9:3 0 a.m. Mailed notice.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Daniel L Miles
Plaintiff,

v. Case No.: 1:06-cv-04351

Honorable Charles P. Kocoras

Dale E. Klein
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Friday, November 3, 2006:

MINUTE entry before Judge Charles P. Kocoras: Defendant having filed an answer to the complaint in lieu of a contemplated motion to dismiss, the briefing schedule set by the Court on 10/19/2006 is vacated. Ruling set for 12/6/2006 is stricken. Parties are still to appear before the Court on 12/6/2006 at 9:30 a.m. for a status hearing. Mailed notice.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

Daniel L Miles
Plaintiff,

v. Case No.: 1:06-cv-04351

Honorable Charles P. Kocoras

Dale E. Klein
Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, December 6, 2006:

MINUTE entry before Judge Charles P. Kocoras: Status hearing held on 12/6/2006. Plaintiff is given to 1/17/2007 to retain counsel, and for counsel to file an appearance. Status hearing set for 1/17/2007 at 09:30 AM. Mailed notice.

United States District Court
Northern District of Illinois
Eastern Division

Daniel L. Miles

v.

Dale E. Klein

JUDGMENT IN A CIVIL CASE

Case Number: 06 C 43 51

o Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

o Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's complaint is dismissed. Plaintiff to take nothing. All matters in controversy having been resolved, final judgment is entered in favor of the defendant and against plaintiff.

Michael W. Dobbins, Clerk of Court

Date: 1/17/2007

/s/ Stephen C. Tokoph, Deputy Clerk

United States District Court, Northern District of Illinois

Assigned Judge	Charles P. Kocoras		
Case Number	06 C 4351	DATE	1/17/2007
Case Title	Miles vs. Klein		

DOCKET ENTRY TEXT

Status hearing held on 1/ 17/2007. Plaintiff's oral motion for class certification is denied. Plaintiff informs the Court that he does not wish to pursue his individual claims. The complaint is hereby dismissed for plaintiff s lack of desire to pursue this case. Plaintiff to take nothing. All matters in controversy having been resolved, final judgment is entered in favor of defendant and against plaintiff.

Courtroom Deputy Initials:	SCT

06C4351 Miles vs. Klein

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 07-1596

Daniel L. Miles, Plaintiff-Appellant, vs. Dale E. Klein, successor to Nils J. Diaz, Chairman, U.S. Nuclear Regulatory Commission, Defendant-Appellee.	Appeal form the United States District Court for the Northern District of Illinois No. 06 C 4351 Charles P. Kocoras, Judge.

MOTION OF PLANTIFF-APPELLANT FOR STAY PENDING A PETITION FOR WRIT OF CERTIORARI TO THE U.S. SUPREME COURT

Plaintiff-Appellant, Daniel L. Miles, moves for stay pending a petition for a writ of certiorari to the U.S. Supreme Court for the reasons as follows:

In essence, Plaintiff-Appellant believes that the effect of the panel Majority's decision of affirmance, as well as the District Court's final judgment of dismissal, in establishing or upholding slavery conflicts with the first section of the Thirteenth Amendment of the United States Constitution. In relevant part, the Thirteenth Amendment's first section provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"This Amendment...is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Amendment "has a reflex character also, establishing and decreeing universal civil...freedom throughout the United States." *Id.* at 20. In addition, the Amendment has an "equal protection" component that proscribes, except as a punishment for crime, the unequal treatment of all African Americans, and other minorities, in the exercise of their natural rights, Cf. *Hodges v. United States*, 203 U.S. 1, 17 (1906); *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989); In re Turner, 24 F. Cas. 337, 339-340 (1867); see also Congressional Globe, 38th Cong., 1st Sess. 1482 (1864). "Slavery implies involuntary servitude,-a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services."

Plessy v. Ferguson, 163 U.S. 537, 542 (1896). The plain intention of the Thirteenth Amendment was "to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit, which is the essence of involuntary servitude." *Bailey v. State of Alabama*, 219 U.S. 219, 241 (1911).

The language of the filed class-action complaint demonstrates not only Defendant-Appellee's pattern or practice of race and sex discrimination since January 19, 1975 to present, but also, during the same period of time, Defendant-Appellee's conduct in restraining the Black male class from occupations of gain by compulsory labor and services being directed against the will of class member for the benefit of class member of the white male class. Clearly, the lack of power or freedom of class member of the Black male class to make or perform contracts is being demonstrated from the language of said complaint that also includes demonstrating the restriction on such class member's freedom of action by unlawful restraint. "One of the disabilities of slavery, one of the indicia of its existence, was a lack of power to make or perform contracts." *Hodges v. United States*, 203 U.S. 1, 17 (1906); see also

Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 666 (1993). It is equally clear from the language of said complaint that class member of the Black male class is being continually compelled by force to submit to and comply with the prescribed or dictated course of action by Defendant-Appellee for the benefit of class member of the white male class, and, in essence of the foregoing, such class member of the Black male is being continually compelled to serve or service for the benefit another as indicated. In view of the foregoing, it is clear that

> "Black males, including Plaintiff-Appellant, had and have been, and, as a result of the panel Majority's decision of affirmance, are being continually and purposefully subjected to and held in a condition of slavery in contravention of the Thirteenth Amendment's first section; and occurring concurrently, the deprivation of the rights to be free from slavery and involuntary servitude."

The belief of Plaintiff-Appellant is that the result of the panel Majority's decision of affirmance effectively affirmed the continuation of such subjection and its oppression. Likewise, the action taken thus far in this case has vividly reminded Plaintiff-Appellant of the following: 1) each member becomes or acts as the agent of every other

member; 2) the agreement was a tacit understanding, created by a long course of conduct and executed in the same way, and 3) not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. As Plaintiff-Appellant has indicated in his filed reply brief, "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 US 488, 496 (1974).

In essence, Plaintiff-Appellant also believes that he District Court abused its discretion in dismissing the case. The District Judge's statements, urging Plaintiff-Appellant to proceed first with his individual claims and then with the class claims - in steps as the Judge stated - or he would have to dismiss the case, conflicted with statements forbidden by the Seventh Circuit. The Seventh Circuit stated in the case of *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001): "A court may not say something like let's resolve the merits first and worry about the class later...or I'm not going to certify a class unless I think that the plaintiffs will prevail." Well, as a result of the District Court's dismissal, the merits of the case were resolved first and irrespective of Plaintiff-Appellant's written motion for class certification pursuant to Rule 23. In addition, the Seventh Circuit stated in the case of *Mace*

v. Van Ru Credit Corp., 109 F. 3d 338, 344 (7th Cir. 1997): "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his...rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's ....labor." Due to the forty-five day time limit being imposed by 29 C.F.R. § 1614.105 (a)(1) for allegations of discrimination and thus small recoveries of damages, Plaintiff-Appellant has not had a significant incentive to bring or proceed as an individual action for the adjudication of his individual claims in the absence of a class action.

In essence, Plaintiff-Appellant also believes that he District Court abused its discretion in denying class certification. The District Court's dismissal of the case resulted in its failure to consider and decide the written motion for class certification first and pursuant to Rule 23. In the case of *Payton v. Kane County*, 308 F.3d 673, 680 (7th Cir. 2002), the Seventh Circuit explained: "....our analysis with the question of class certification, mindful of the Supreme Court's directive to consider issues of class certification prior to issues of standing. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999):

'The class certification issues are...logically antecedent to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing. Thus the issue about Rule 23 certification should be treated first.' *Id.* at 831. This involves defining the class and assessing whether the proposed class representatives can satisfy all four requirements of Rule 23(a), and at least one of the categories of Rule 23(b)."

A "determination of the propriety of class certification should not turn on likelihood of success on the merits." *Payton v. County of Kane,* 308 F.3d 673, 677 (7th Cir. 2002).

In conclusion, since the filing of the class-action complaint, Plaintiff-Appellant has been seeking to gain a class-action status for the lawsuit pursuant to Rule 23, to gain appointment of interim or class counsel pursuant to Rule 23(g), to gain a full and fair opportunity to litigate the issue of a pattern or practice of race and sex discrimination on own behalf and on behalf of others as a class, and to gain others as described in the said complaint. Thus far, none has been gained. In addition, Plaintiff-Appellant has not claimed to represent the specified class as class counsel as otherwise stated in the panel Majority's order.

Nevertheless, the nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is supreme law. As such, Plaintiff-Appellant believes that the Thirteenth Amendment's first section nullifies both the panel Majority's decision of affirmance and the District Court's final judgment of dismissal. Furthermore, the language of the filed class-action complaint not only serves as a civil complaint showing federally protected rights being continually violated, but also serves as a criminal complaint providing information of criminal offenses being continually committed against Plaintiff-Appellant as well as the United States. Criminal offenses under federal criminal statutes such as: 18 U.S.C. § 242 (Deprivation of Rights under Color of Law); 18 U.S.C. 245(b)(1)(B)/(C) (Federally Protected Activities); 18 U.S.C. § 1584 (Involuntary Servitude); 18 U.S.C. § 1589 (Forced Labor); 18 U.S.C. § 1951 (Robbery); the Trafficking Victims Protection Act (TVPA) of 2000 regarding coercion, slavery, and involuntary servitude; and possibly others.

Plaintiff-Appellant's use of the terms labor and services together denotes continued work, operation, and /or undertaking for the benefit of another. For some reasons or another, Plaintiff-Appellant believes that this matter will ultimately end up before the United States Congress.

Respectfully submitted,

s/ Daniel L. Miles
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No. 07-1596

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANIEL L. MILES,
PLAINTIFF-APPELLANT,

v.

DALE E. KLEIN, SUCCESSOR TO NILS J. DIAZ, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CASE NO. 06-CV-04351
THE HONORABLE JUDGE CHARLES P. KOCORAS

PETITION OF PLAINTIFF-APPELLANT FOR REHEARING EN BANC

Daniel L. Miles
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Hillside, IL 60162
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2. Plaintiff-Appellant argues that the panel Majority has purposefully overlooked the following points of fact and law:

C. Due to the nature and extent of this case, the panel Majority overlooks the fact that the District Court's dismissal of the case resulted in its failure to consider the written motion for class certification pursuant first and pursuant to Rule 23.....8

D. Due to the nature and extent of this case, the panel Majority overlooks the fact that Plaintiff-Appellant has not had a significant incentive to bring or proceed as an individual action for the adjudication of his individual claims in the absence of a class action.....11

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STATEMENTS REQUIRED BY RULES 35(b)

Rehearing en banc is warranted because the proceeding involves a question of exceptional importance:

> Whether the effect of the panel Majority's decision of affirmance, as well as the District Court's final Judgment of dismissal, in establishing or upholding slavery conflicts with the first section of the Thirteenth Amendment of the United States Constitution.

Rehearing en banc is warranted because the panel Majority's decision conflicts with decisions of the United States Supreme Court or of this Court and consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions. In support of this petition for rehearing en banc, the attention of this honorable Court is directed to material points of fact and law that have been purposefully overlooked by the panel Majority in its Order of Affirmance decided October 11, 2007:

a. Due to the nature and extent of this case, the panel Majority overlooks the fact that the District Court's dismissal of the case resulted in its failure

to consider the written motion for class certification first and pursuant to Rule 23.

b. Due to the nature and extent of this case, the panel Majority overlooks the fact that Plaintiff-Appellant has not had a significant incentive to bring or proceed as an individual action for the adjudication of his individual claims in the absence of a class action.

BACKGROUND AND STATEMENT OF FACTS

The Underlying Litigation in the District Court

On August 11, 2006, Plaintiff-Appellant filed a class-action discrimination complaint, on own behalf and on behalf of others as a class, in the United States District Court for the Northern District of Illinois, Eastern Division, alleging, among others, that Defendant-Appellee, Dale E. Klein, successor to Nils J. Diaz, Chairman, U.S. Nuclear Regulatory Commission, has violated Title VII of the Civil Rights Act of 1964, as amended, by engaging in a pattern or practice of race and sex discrimination. The filed class-action complaint included a written motion for class certification pursuant to Rule 23.

1. During the initial status hearing held on October 19, 2006, Parties were supposed to report on the status of a possible settlement. However, no offer of a settlement was discussed prior to or during the hearing. Plaintiff-Appellant indicated to the District Judge that Counsel for Defendant-Appellee had not filed an answer to the complaint. The District Judge granted Counsel for Defendant-Appellee leave to file an answer. Although Counsel for Defendant-Appellee expressed intention to file a motion to dismiss, an answer

denying nearly all allegations in the complaint was filed instead.

2. During a status hearing held on December 6, 2006, Plaintiff-Appellant directed the District Judge's attention to Plaintiff-Appellant's complaint pertaining to the written statements asserted for class certification pursuant to Fed. R. Civ. P. 23. As conveyed to Plaintiff-Appellant, the District Judge said that Plaintiff-Appellant should proceed first with the individual claims and then with the class action claims - in steps as the Judge stated - or he would have to dismiss the case. Plaintiff-Appellant sensed that the District Judge's statements were likewise the consensus of Counsel for Defendant-Appellee. Rather than proceed first with Plaintiff-Appellant's individual claims or risk the case being dismissed, Plaintiff-Appellant requested and was granted leave to try again to retain an attorney.

3. During a status hearing held on January 17, 2007, Plaintiff-Appellant informed the District Judge of Plaintiff-Appellant's unsuccessful attempt to retain an attorney due to the nature of the case. In spite of Plaintiff-Appellant's statement, the District Judge expressed intention to proceed with discovery (in other words, to proceed with discovery relating to Plaintiff-Appellant's individual claims as opposed to discovery relating to class certification or the class claims). Plaintiff-Appellant stated that the lawsuit was filed as a

class action and not as an individual action. Plaintiff-Appellant asked the District Judge whether he would certify the action as a class action. The District Judge responded with a resounding 'no', and indicated, without any detail, that a rule of the Seventh Circuit was the reason for the denial. Plaintiff-Appellant stated that he did not see how the Court could proceed - that is, to proceed without class certification. The District Judge asked Plaintiff-Appellant, what did he want to do? Plaintiff-Appellant responded that it was up to the District Judge. The District Judge dismissed case and stated so in the final judgment, entered January 17, 2007, without making any of class determinations (numerosity, commonality, typicality, adequacy of representation, predominance of common issues, and etc.) pursuant to Fed. R. Civ. P. 23. A notice of appeal was filed on March 14, 2007 in the District Court. Nonetheless, the District Judge provided his labor and services.

The Underlying Litigation in the Court of Appeals

On April 24, 2007, Plaintiff-Appellant filed his primary brief in this Court of Appeals. (Pl. Exh. B, App. B1). On May 11 2007, Defendant-Appellee filed a motion as United States' Motion for Summary Affirmance or To Reset Briefing Schedule instead of a response brief. A reply motion was subsequently filed by Plaintiff-Appellant on May 22, 2007. The Judges initially assigned to this appeal

granted only the motion to reset briefing schedule. Worthy of notice, since the filing of the notice of appeal and before the filing of his primary brief, Plaintiff-Appellant made two personal appearances before and several phone calls to the District Court Reporter with no avail in his attempts to receive the transcripts of the District Court proceedings. Approximately 10 minutes after the filing of his primary brief, Plaintiff-Appellant received a cell-phone call informing him that transcripts were ready to be received. The transcripts received are tainted. The transcripts do not correctly reflect the statements actually made during the status hearings held in the District Court (the transcripts reveal modified, omitted, and unexpressed statements). Nonetheless, the District Court Reporter provided her labor and services.

On July 6, 2007, Defendant-Appellee filed a response brief. (Pl. Exh. F, App. F1). A reply brief was subsequently filed by Plaintiff-Appellant on July 23, 2007. (Pl. Exh. G, App. G1). On October 11, 2007, the panel Majority affirmed the District Court's denial of class certification and its dismissal of the case. Nonetheless, each member of the panel Majority provided his labor and services.

ARGUMENT

1. Plaintiff-Appellant argues that the effect of the panel Majority's decision of affirmance, as well as the District Court's final judgment of dismissal, in establishing or upholding slavery conflicts with the first section of the Thirteenth Amendment of the United States Constitution.

Following the Civil War (1865) the Thirteenth Amendment to the United States Constitution was adopted, which have become an integral part of that instrument as a supreme law of the land, binding upon all the states and all the people, as well as upon every branch of the federal government. See *Hodges v. United States*, 203 U.S. 1, 26 (1906). It has long been settled that the Amendment "is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). In relevant part, the Thirteenth Amendment's first section provides:

> Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"This Amendment...is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Amendment "has a reflex character also, establishing and decreeing universal civil... freedom throughout the United States." *Id.* at 20. In addition, the Amendment has an "equal protection" component that proscribes, except as a punishment for crime, the unequal treatment of all African Americans, and other minorities, in the exercise of their natural rights, and that mandates that both the state and federal government take affirmative actions to ensure the free exercise of those natural rights. Cf. *Hodges v. United States*, 203 U.S. 1, 17 (1906); *Wong v. Stripling*, 881 F.2d 200 (5th Cir. 1989); see also Congressional Globe, 38th Cong., 1st Sess. 1482 (1864). "The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery." *Slaughter-House Cases*, 83 U.S. 36, 69 (1872). "Slavery implies involuntary servitude,-a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to

the disposal of his own person, property, and services." *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896); see also *Bailey v. State of Alabama*, 219 U.S. 219, 241 (1911). Undeniably, the Thirteenth Amendment provides individuals with rights, among others, to be free from slavery and involuntary servitude, the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

With the foregoing statements in mind, it is clear that the language of the filed class-action complaint demonstrates not only Defendant-Appellee's pattern or practice of race and sex discrimination since January 19, 1975 to present, but also, during the same period of time, Defendant-Appellee's conduct in restraining the Black male class from occupations of gain by compulsory labor and services against the will of class member for the benefit of class member of the white male class. "One of the disabilities of slavery, one of the indicia of its existence, was a lack of power (or freedom) to make or perform contracts." See *Hodges v. United States*, 203 U.S. 1, 17 (1906); see also *Northeastern Fla. Chapter of the Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Clearly, the deprivation of the rights to be free from slavery and involuntary servitude is being demonstrated

from the language of the filed class-action complaint. On the basis of the foregoing considerations, it is clear that:

> Black males, including Plaintiff-Appellant, had and have been, and, as a result of the panel Majority's decision of affirmance, are being continually and purposefully subjected to a condition of slavery in contravention of the Thirteenth Amendment's first section.

The belief of Plaintiff-Appellant is that the result of the panel Majority's decision of affirmance effectively affirmed the continuation of such subjection and its oppression. likewise, the action taken thus far in this case has vividly reminded Plaintiff-Appellant of the following: 1) each member becomes or acts as the agent of every other member; 2) the agreement was a tacit understanding, created by a long course of conduct and executed in the same way, and 3) not the form or manner in which the understanding is made, but the fact of its existence and the further one of making it effective by overt conduct are the crucial matters. As Plaintiff-Appellant has indicated in his filed reply brief, "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 US 488, 496 (1974).

Profoundly, one of the effects of the Civil War (1861-1865) was to establish and secure freedom for all without unlawful restraint in this country:

"A military necessity required us to emancipate the [black man] and accept his services as a soldier that the Republic might be saved. We all remember when victory after victory was crowning the rebel armies on almost every battle-field and the armies of the Republic were ingloriously retiring before the advancing banners of rebellion, that national peril compelled us to proclaim the freedom of the slave and call him to our aid. Before the ranks of our armies had been swelled by two hundred thousand of these colored soldiers the tide of victory was changed, the rebel armies suffered defeat after defeat in rapid succession until they were finally dispersed and the war ended. The services of our soldiers are no longer required to defend the country; it now becomes a political necessity to preserve the fruits of our victories and to secure a permanent peace....

....

In conclusion permit me to say that in all our action relating to the restoration of the Union of these States we should carefully avoid all compromises with wrong, oppression, and injustice. We should resolve to stand firmly by the right, and when Union is reorganized let it be on the basis of universal freedom...for all loyal men." Speech of Hon. B.F. Loan of Missouri, in the House of Representatives, March 3, 1866, Appendix to Congressional Globe, 39th Cong., 1st Sess., p.145.

2. Plaintiff-Appellant argues that due to the nature and extent of this case, the panel Majority overlooks the fact that the District Court's dismissal of the case resulted in its failure to consider the written motion for class certification first and pursuant to Rule 23.

As argued in Plaintiff-Appellant's primary and reply briefs, the District Court dismissed the case sua sponte, and its dismissal for Plaintiff-Appellant's lack of desire to pursue the case can be fairly regarded as a "dismissal for want of prosecution." Rule 41(b) of the Federal Rules of Civil Procedure addresses the involuntary dismissal of an action and claim and provides:

> "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for

> dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

Given that Plaintiff-Appellant had neither filed a notice or stipulation of dismissal nor made a request for dismissal under Fed. R. Civ. P. 41 (a)(1) or (2), and given that it was not otherwise specified, the District Court's dismissal for want of prosecution operated as an "adjudication upon the merits." The Seventh Circuit stated in the case of *In re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995): "Dismissal for want of prosecution is an undeniably harsh sanction, having the procedural effect of an adjudication on the merits against the plaintiff. See FED. R. CIV. P. 41(b). This severity requires that district courts resort to dismissal only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailable." GCIU Employer Retirement Fund v. Chicago Tribune, 8 F.3d 1195, 1199 (7th Cir. 1993) (quoting Pyramid Energy,

Ltd. v. Heyl & Patterson, Inc., 869 F.2d1058, 1061 (7th Cir. 1989)). See also Northern District Court of Illinois Local Rule 41.1. It is inescapably clear that there is nothing in the record to show bad faith, failure, or a lack of diligence to meet deadlines or any contumacious conduct by Plaintiff-Appellant.

As discussed above in regard to the District Judge's statements urging Plaintiff-Appellant to proceed first with his individual claims and then with the class claims - in steps as the Judge stated - or he would have to dismiss the case, the Seventh Circuit stated in the case of *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001): "A court may not say something like let's resolve the merits first and worry about the class later...or I'm not going to certify a class unless I think that the plaintiffs will prevail." As a result of the District Court's dismissal, the merits of the case were resolved first and irrespective of Plaintiff-Appellant's written motion for class certification pursuant to Rule 23. A "determination of the propriety of class certification should not turn on likelihood of success on the merits." *Payton v. County of Kane,* 308 F.3d 673, 677 (7th Cir. 2002).

Even assuming that the dismissal was for failure to prosecute, although Plaintiff-Appellant argued otherwise based on the statements in the District Court's final

judgment order, the Seventh Circuit stated in the case of *Kruger v. Apfel*, 214 F.3d 784 (7th Cir. 2000), a case which involved an issue of failure to prosecute: "We will find an abuse of discretion where the district court commits an error of law, *Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999), or fails to consider an essential factor, see *Robyns v. Reliance Standard Life Insurance Co.*, 130 F.3d 1231, 1236 (7th Cir.1997)." The District Court failed to consider an essential factor in this case, namely, whether Plaintiff-Appellant's written motion for class certification satisfied all four requirements of Rule 23(a), and at least one of the categories of Rule 23(b). In the case of *Payton v. Kane County*, 308 F.3d 673, 680 (7th Cir. 2002), the Seventh Circuit explained: "....our analysis with the question of class certification, mindful of the Supreme Court's directive to consider issues of class certification prior to issues of standing. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999):

> 'the class certification issues are...logically antecedent to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing. Thus the issue about Rule 23 certification should be treated first.' *Id.* at 831. This involves defining the class and assessing whether the proposed class representatives

can satisfy all four requirements of Rule 23(a), and at least one of the categories of Rule 23(b)."

3. Plaintiff-Appellant argues that due to the nature and extent of this case, the panel Majority overlooks the fact that Plaintiff-Appellant has not had a significant incentive to bring or proceed as an individual action for the adjudication of his individual claims in the absence of a class action.

Due to the forty-five day time limit being imposed by 29 C.F.R. § 1614.105 (a)(1) for allegations of discrimination and thus small recoveries of damages, "the plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually..." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985). "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief

beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences." *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980). As the Seventh Circuit stated in the case of *Mace v. Van Ru Credit Corp.*, 109 F. 3d 338, 344 (7th Cir. 1997): "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his... rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's ....labor."

CONCLUSION

Since the filing of the class-action complaint, Plaintiff-Appellant has been seeking to gain a class-action status for the lawsuit pursuant to Rule 23, to gain appointment of interim or class counsel pursuant to Rule 23(g), to gain a full and fair opportunity to litigate the issue of a pattern or practice of race and sex discrimination on own behalf and on behalf of others as a class, and to gain others as described in the complaint. None has been gained. In addition, Plaintiff-Appellant has not claimed to represent the specified class as class counsel as otherwise stated in the panel Majority's order. Nevertheless, the nullity of any act inconsistent with the Constitution is

produced by the declaration that the Constitution is supreme law. As such, Plaintiff-Appellant believes that the Thirteenth Amendment's first section nullifies both the panel Majority's decision of affirmance and the District Court's final judgment of dismissal.

For the reasons stated above, Plaintiff-Appellant respectfully requests that this Court vacate its opinion and set this case for rehearing en banc. If this petition for rehearing en banc is granted, Plaintiff-Appellant requests of this Court to retain jurisdiction over this case or controversy.

Respectfully submitted,

s/ Daniel L.Miles
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Dated: November 20, 2007

No. 07-1596

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANIEL L. MILES,
PLAINTIFF-APPELLANT,

v.

DALE E. KLEIN, SUCCESSOR TO NILS J. DIAZ, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CASE NO. 06-CV-04351
THE HONORABLE JUDGE CHARLES P. KOCORAS

BRIEF AND REQUIRED SHORT APPENDIX OF PRO SE PLANTIFF-APPELLANT

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JURISDICTIONAL STATEMENT

The Plaintiff-Appellant filed, on August 11, 2006, a class-action discrimination complaint, on own behalf and on behalf of others as a class, in the United States District Court for the Northern District of Illinois, Eastern Division, alleging, among others, that Defendant-Appellee, Dale E. Klein, successor to Nils J. Diaz, Chairman, U.S. Nuclear Regulatory Commission, has violated Title VII of the Civil Rights Act of 1964, as amended, by engaging in a pattern or practice of race and sex discrimination

The District Court had jurisdiction over this action pursuant to 42 U.S.C. 2000e-5(f)(3), 28 U.S.C. §§ 1331, 1343(a)(4), 2201, and 2202, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.*, and the Civil Rights Act of 1991. This appeal is from a final judgment, entered on January 17, 2007, that disposed of all claims in the case. No motion to alter or amend judgment was filed. Plaintiff-Appellant filed a timely Notice of Appeal, within 60 days after the judgment was entered, in the District Court on March 14, 2007. This appeal is therefore timely under 28 U.S.C. § 2107(b) and Federal Rules of Appellate Procedure 3(a)(1) and 4(a)(1)(B). This Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1) Whether the District Court abused its discretion in dismissing the case and, if so,
2) Whether the District Court abused its discretion in in denying class certification.

STATEMENT OF THE CASE

On December 15, 2005, Daniel L. Miles ("Complainant") initiated EEO counseling on a class-action complaint, alleging, among others, that a pattern or practice of race and sex discrimination and ongoing discriminatory hiring and promotion policies have resulted in a disparate impact on, and have resulted in a disparate treatment of, Black males, including Complainant, and stating that Complainant, as a class agent, is representing current and former Black male employees and applicants for employment (including applicants who would have applied but for the discrimination), at Region 3 of the U.S. Nuclear Regulatory Commission, who had or have been, or are being adversely affected by Defendant's pattern or practice and/or discriminatory policies that denied or are denying them employment opportunities on the basis of their race and sex. Complainant's claims of discrimination were not resolved in counseling.

On February 3, 2006, Complainant filed a formal class-action discrimination complaint, including a petition for class certification, with the Office of Small Business and Civil Rights of the U.S. Nuclear Regulatory Commission ("Agency"). Complainant's petition for class certification was denied, on April 28, 2006, by an Administrative Judge of the U.S. Equal Employment Opportunity Commission ("EEOC"). In the Judgment entered, the Administrative Judge remanded the case to the Agency to be processed as an individual complaint. Complainant informed the Agency in writing that an individual complaint was not filed in the absence of a class-action complaint.

On May 16, 2006, Complainant received the Agency's Final Order implementing the Administrative Judge's decision and constituting the Agency's final action regarding the class-action complaint. The received Final Order noted that Complainant may file an appeal with EEOC or a civil action in appropriate U.S District Court. Complainant chose to file a class-action complaint in the U.S. District Court for The Northern District of Illinois, Eastern Division.

On August 11, 2006, Daniel L. Miles ("Plaintiff") filed a class-action discrimination complaint, on own behalf and on behalf of others as a class, in the United States District Court for the Northern District of Illinois, Eastern Division,

alleging, among others, that Defendant-Appellee, Dale E. Klein, successor to Nils J. Diaz, Chairman, U.S. Nuclear Regulatory Commission, has violated Title VII of the Civil Rights Act of 1964, as amended, by engaging in a pattern or practice of race and sex discrimination.

On October 19, 2006, December 6, 2006, and January 17, 2007, status hearings were held in the District Court, and such hearings are discussed below.

STATEMENT OF THE FACTS

The Underlying Litigation in the District Court

4. During the initial status hearing held on October 19, 2006, Parties were supposed to report on the status of a possible settlement. However, no offer of a settlement was discussed prior to or during the hearing. Plaintiff-Appellant indicated to the District Judge that Counsel for Defendant-Appellee had not filed an answer to the complaint. The District Judge granted Counsel for Defendant-Appellee leave to file an answer. Although Counsel for Defendant expressed intention to file a motion to dismiss, an answer denying nearly all allegations in the complaint was filed instead.

5. During a status hearing held on December 6, 2006, Plaintiff-Appellant directed the District Judge's attention to Plaintiff-Appellant's complaint pertaining to the written statements asserted for class certification pursuant to Fed. R.

6. During a status hearing held on January 17, 2007, Plaintiff-Appellant informed the District Judge of Plaintiff-Appellant's unsuccessful attempt to retain an attorney due to the nature of the case. In spite of Plaintiff-Appellant's statement, the District Judge expressed intention to proceed with discovery (in other words, to proceed with discovery relating to Plaintiff-Appellant's individual claims as opposed to discovery relating to class certification or the class claims). Plaintiff-Appellant stated that the lawsuit was filed as a class action and not as an individual action. Plaintiff-Appellant asked the District Judge whether he would certify the action as a class action. The District Judge responded with a resounding 'no', and indicated, without any detail, that a rule of the Seventh Circuit was the reason for the denial. Plaintiff-Appellant stated that he did not see how the

Court could proceed - that is, to proceed without class certification. The District Judge asked Plaintiff-Appellant, what did he want to do? Plaintiff-Appellant responded that it was up to the District Judge. The District Judge dismissed case and stated so in the final judgment, entered January 17, 2007, without making any of class determinations (numerosity, commonality, typicality, adequacy of representation, predominance of common issues, and etc.) pursuant to Fed. R. Civ. P. 23. This appeal followed.

SUMMARY OF ARGUMENT

The arguments raised by Plaintiff-Appellant herein address threshold issues. First, Plaintiff-Appellant argues that District Court abused its discretion in dismissing the case. Second, Plaintiff-Appellant argues that the District Court abused its discretion in denying class certification.

ARGUMENT

1. Plaintiff-Appellant argues that District Court abused its discretion in dismissing the case.

The District Court dismissed the case sua sponte, and its dismissal for Plaintiff-Appellant's lack of desire to pursue the case can be fairly regarded as a "dismissal for want of prosecution." Rule 41(b) of the Federal Rules of

Civil Procedure addresses the involuntary dismissal of an action and claim and provides:

> "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

"Rule 41(a) makes clear that 'an adjudication upon the merits' in Rule 41(b) is the opposite of a dismissal without prejudice--that is, it is a dismissal that prevents refiling of the claim in the same court." *Semtek International, Inc. v. Lockheed Martin Corp.* 531 U.S. 497, 498 (2001).

Given that Plaintiff-Appellant had neither filed a notice or stipulation of dismissal nor made a request for dismissal under Fed. R. Civ. P. 41 (a)(1) or (2), and given that it was not otherwise specified, the District Court's dismissal for want of prosecution operated as an

"adjudication upon the merits." The Seventh Circuit stated in the case of *In re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995): "Dismissal for want of prosecution is an undeniably harsh sanction, having the procedural effect of an adjudication on the merits against the plain- tiff. See FED. R. CIV. P. 41(b). This severity requires that district courts resort to dismissal only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailable." GCIU Employer Retirement Fund v. Chicago Tribune, 8 F.3d 1195, 1199 (7th Cir. 1993) (quoting Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d1058, 1061 (7th Cir. 1989)). See also Northern District Court of Illinois Local Rule 41.1. It is inescapably clear that there is nothing in the record to show bad faith, failure, or a lack of diligence to meet deadlines or any contumacious conduct by Plaintiff-Appellant.

As discussed above in regard to the District Judge's statements urging Plaintiff-Appellant to proceed first with his individual claims and then with the class claims - in steps as the Judge stated - or he would have to dismiss the case, the Seventh Circuit stated in the case of *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672 (7th Cir. 2001): "A court may not say something like let's resolve the merits first and worry about the class later...or I'm not going to

certify a class unless I think that the plaintiffs will prevail." As a result of the District Court's dismissal, the merits of the case were resolved first and irrespective of Plaintiff-Appellant's written motion for class certification pursuant to Fed. R. Civ. P. 23.

As for the reason why Plaintiff-Appellant was urged to proceed with his individual claims first and then with the class claims or face dismissal of the case: "Indeed, Rule 23 is carefully drafted to provide a mechanism for the expeditious decision of common questions. Its purposes might well be defeated by an attempt to decide a host of individual claims before any common question relating to liability has been resolved adversely to the defendant." *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 881 (1984). Moreover, "The crucial difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination is manifest. The inquiry regarding an individual's claim is the reason for a particular employment decision, while at the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking." *Cooper*, 467 U.S. at 876.

2. Plaintiff-Appellant argues that the District Court abused its discretion in denying class certification.

A. The District Court entered the final judgment without making any of class determinations (numerosity, commonality, typicality, adequacy of representation, predominance of common issues, and etc.) pursuant to Fed. R. Civ. P. 23.

Fed. R. Civ. P. 23(c)(1)(A) provides, in relevant part: When a person sues...as a representative of a class, the court must...determine by order whether to certify the action as a class action. As the Supreme Court stated in the case of *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982): "Class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." "Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim..." In supplement to this, the Supreme Court stated in the case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (*quoting Miller v. Mackey International*, 452 F.2d 424, 427 (CA5 1971)): "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met."

B. The requirements for class certification under Rule 23(a) and (b) of the Federal Rules of Civil Procedure are satisfied as asserted in Plaintiff-Appellant's class-action complaint.

Fed. R. Civ. P. 23(a) sets out the prerequisites to a class action. Rule 23(a) states:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The plaintiff has the burden of proving that a case is appropriately a class action and meets all the requirements of Rule 23. *Valentino v. Howlett*, 528 F.2d 975, 978 (7th Cir. 1976). These requirements effectively "limit the class claims to those fairly encompassed by the named plaintiff's claims." *General Tel. Co. of the Northwest* v. *EEOC*, 446 U.S. 318, 330 (1980); see also *General Tel. Co. of Southwest* v. *Falcon*, 457 U.S. 147, 156 (1982). "Failure to meet any one of the requirements of Rule 23 precludes certification of

a class." *Valentino*, 528 F.2d at 978. Once these requirements are satisfied, the plaintiff must also satisfy one of the subsections of Rule 23(b). See *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993).

1. Rule 23(a)(1) – Numerosity

"The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *General Tel. Co. of the Northwest v. EEOC*, 446 U.S. 318, 330 (1980). Plaintiffs seeking class certification are not required to specify the exact number of persons in the class, *Vergara v. Hampton*, 581 F.2d 1281, 1284 (7th Cir. 1978), but must provide some facts to substantiate the claim that the number of persons is too numerous to be joined to the action, *Valentino v. Howlett, 528 F.2d 975, 978 (7th Cir. 1976)*. Although the exact number of class members is not specified in Plaintiff-Appellant's class-action complaint, facts are provided. "Courts are not infrequently called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all

were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree. In such cases where the interests of those not joined are of the same class as the interests of those who are, and where it is considered that the latter fairly represent the former in the prosecution of the litigation of the issues in which all have a common interest, the court will proceed to a decree." Hansberry v. Lee, 311 U.S. 32, 41-42 (1940).

2. Rule 23(a)(2) – Commonality

The commonality requirement requires "questions of law or fact common to the class." As the Seventh Circuit explained: "The fact that there is some factual variation among the class grievances will not defeat a class action. A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a) (2)." *Rosario v. Livaditis,* 963 F.2d 1013, 1017-18 (7th Cir. 1992). Commonality does not require that all questions of fact or law be identical. *Johns v. DeLeonardis,* 145 F.R.D. 480, 482 (N.D. Ill. 1992). Rather, the commonality requirement is satisfied as long as "the class claims arise out of the same legal or remedial theory." *Johns,* 145 F.R.D at 483. As one court noted, "[c]ommonality is not a demanding requirement: It calls only for the existence of at least one issue of fact or law common to all class members." *Meiresonne v. Marriot Corp.*, 124 F.R.D. 619, 622 (N.D. Ill.

1989); *see also Wagner v. NutraSweet Co.*, 170 F.R.D. 448, 450 (N.D. Ill. 1997) (must show at least one question is common to the class). Plaintiff-Appellant has shown common questions pertaining to the class.

3. Rule 23(a)(3) – Typicality

The typicality requirement requires that claims of Plaintiff are typical of the claims of the class members. "Typicality under Rule 23(a)(3) should be determined with reference to the company's actions, not with respect to particularized defenses it might have against certain class members." *Wagner v. Nutrasweet Company,* 95 F.2d 527, 534 (7th Cir. 1996). As the Seventh Circuit held, "[t]he question of typicality in Rule 23(a) (3) is closely related to the preceding question of commonality. . . . [A] plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his. . . . claims are based on the same legal theory." *Rosario v. Livaditis,* 963 F.2d at 1018. As with commonality, "[t]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). "Instead, we look to the defendant's conduct and the plaintiff's legal theory to satisfy Rule 23(a) (3)." *Rosario*, 963 F.2d at 1018; *Wagner v.*

Nutrasweet Co., 95 F.3d 527, 534 (7th Cir. 1996). Plaintiff-Appellant has shown that the claims of Plaintiff-Appellant and the class members arise out of common facts and similar legal and remedial theories.

4. Rule 23(a)(4) – Adequacy of Representation

The adequacy-of-representation requirement requires that the class representatives "will fairly and adequately protect the interests of the class." To satisfy the adequacy requirement, Plaintiffs must have common interests with the class members, and must vigorously prosecute the interests of the class through qualified counsel. Cf. *Sosna v. Iowa,* 419 U.S. 393 (1975); *accord Susman v. Lincoln American Corp.,* 561 F.2d 86, 90 (7th Cir. 1977). "A representative must be part of the class and possess the same interest and suffer the same injury as the class members." *E.g., East Tex. Motor Freight System, Inc.* v. *Rodriguez,* 431 U.S. 395, 403 (1977).

In the case of *General Tel. Co. of Southwest* v. *Falcon,* 457 U.S. 147, 157-158, n. 13, the Supreme Court noted: "The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be

fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement..." See also *Keele* v. *Wexler*, 149 F.3d 589, 594 (7th Cir. 1998).

Indeed, Plaintiff-Appellant, as a class member, will "fairly and adequately protect the interests of the class," and Plaintiff-Appellant and members of the class share a common interest (with no conflict) and suffer the same injury, thus meeting with requirement of Rule 23(a)(4). Also, an appointment of interim or class counsel is sought pursuant to Fed. R. Civ. P. 23(g).

5. Rule 23(b)(2) - Injunctive and Declaratory Relief

Fed. R. Civ. P. 23(b)(2) requires that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." To satisfy this requirement, Plaintiff-Appellant alleges, among others, that Defendant-Appellee's system of decision-making has resulted in a disparate treatment of, and has resulted in a disparate impact on, Plaintiff-Appellant and the class as a whole. In addition, Plaintiff-Appellant seeks declaratory relief that Defendant-Appellee's pattern or practice and /or discriminatory policies violate federal law; and injunctive relief designed to end and remedy the effect

of the Defendant's pattern or practice and/or discriminatory policies. Such relief by its nature is applicable to the class as a whole and satisfies Rule 23(b)(2)'s requirement that injunctive and declaratory relief be appropriate.

6. Rule 23(b)(3) – Predominance and Superiority

Fed. R. Civ. P. 23(b)(3) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods" for the fair and efficient of adjudication of the controversy. To satisfy this requirement, Plaintiff-Appellant alleges that class certification is also appropriate in this case because, as set forth in more detail in the class-action complaint, common questions predominate over those affecting class members individually, and that a class action is superior to other available methods of resolving this controversy. The alternative to class treatment is certainly numerous individual suits. Such a multiplicity of actions would defeat the economies of scale inherent in the class action procedure and result in substantial waste of judicial resources. Thus, from the viewpoint of public policy, transactional costs and judicial economy, multiple litigations would be manifestly inferior to a class action, thereby satisfying Fed. R. Civ. P. 23(b)(3).

In addition, due to the forty-five day time limit being imposed by 29 C.F.R. § 1614.105 (a)(1) for allegations of discrimination and thus small recoveries of damages, "the plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually..." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985). "The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device. That there is a potential for misuse of the class-action mechanism is obvious. Its benefits to class members are often nominal and symbolic, with persons other than class members becoming the chief beneficiaries. But the remedy for abuses does not lie in denying the relief sought here, but with re-examination of Rule 23 as to untoward consequences." *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 339 (1980).

7. The Liability and Damages Phases

Given that Plaintiff-Appellant seeks certification of the case as a class action pursuant to Fed. R. Civ. 23(b)(2)

and/or 23(b)(3), In *Lemon v. International Union of Operating Engineers, Local No.* 139, 216 F.3d 577 (7th Cir. 2000) (quoting *Jefferson v. Ingersoll International, Inc.*, 195 F.3d 894 (7th Cir. 1999)) the Seventh Circuit discussed three options for the trial court to choose from in handling the liability and damages phases of the case:

1) The first option is certifying the class under Rule 23(b)(3) for all proceedings. In this category of lawsuit, the class members may seek either predominantly legal or equitable remedies, but each member must share common questions of law or fact with the rest of the class, therefore making class-wide adjudication of the common questions efficient compared to repetitive individual litigation of the same questions. In contrast to Rule 23(b)(2), however, certification under Rule 23(b)(3) entails mandatory personal notice and opportunity to opt out for all class members, thereby satisfying the due process concerns in Ortiz. See Fed. R. Civ. P. 23(c)(2); see also Jefferson, 195 F.3d at 898.
2) The second option is divided certification. The district court could certify a Rule 23(b)(2) class for the portion of the case addressing equitable relief and a Rule 23(b)(3) class for the portion of the case addressing damages. This avoids the due process

3) The third option discussed in Jefferson is that the district court might certify the class under Rule 23(b)(2) for both monetary and equitable remedies but exercise its plenary authority under Rules 23(d)(2) and 23(d)(5) to provide all class members with personal notice and opportunity to opt out, as though the class was certified under Rule 23(b)(3). In fact, a district court handled a class certified under Rule 23(b)(2) much this way in Williams. We affirmed and held that the district court provided opportunities to object that "were tantamount to the protections envisioned by Fed. R. Civ. P. 23(c)(2) [for classes certified under subsection (b)(3)]." Williams, 832 F.2d at 104.

CONCLUSION

Plaintiff-Appellant hereby urges reversal of the District Court's dismissal of the case and its denial of class certification. The appeal from denial of class certification is conditional on this Court of Appeals' reversing the dismissal of the case. If feasible, Plaintiff-Appellant requests of this Court of Appeals to retain jurisdiction over this case or controversy.

Respectfully submitted,

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Dated: April 24, 2007

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 07-1596

DANIEL L. MILES,
PLAINTIFF-APPELLANT,

v.

DALE E. KLEIN, SUCCESSOR TO NILS J. DIAZ, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CASE NO. 06-CV-04351
THE HONORABLE JUDGE CHARLES P. KOCORAS

BRIEF OF DEFENDANT-APPELLEE

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Jurisdictional Statement

Appellant's jurisdictional statement is not complete and correct. Accordingly, appellee provides the following jurisdictional statement pursuant to Circuit Rule 28(b).

Daniel Miles claimed that he represented a class in challenging a pattern or practice of race discrimination by the Nuclear Regulatory Commission over a 31-year period. R. 1.[1] The district court had jurisdiction pursuant to 42 U.S.C. § 2000(e)-5(f)(3); 28 U.S.C. § 1331.

On January 17, 2007, Miles requested class certification and informed the district court that he did not wish to pursue his individual claims. By order entered on January 18, 2007, the district court denied the motion for class certification and dismissed the complaint because of Miles' lack of desire to pursue his individual case. R. 15. Judgment was entered on the same day. R. 16. On March 14, 2007, Miles filed a notice of appeal, within the 60 days allowed by Federal Rule of Appellate Procedure 4(a)(1)(B).

This court has jurisdiction to review the final decision of the district court under 28 U.S.C. § 1291.

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[1] "R." references are to numbered items in the record on appeal. Miles fails to cite to the record in most of his brief *See* Fed. R. App. P. 2 8(a)(7)(appellant's brief must contain statement of relevant facts "with appropriate references to the record"); Gagan *v. American Cablevision, Inc.*, 77 F.3d 951, 965 (7th Cir. 1996)(citing Fed. R. App. P. 28(a)); Circuit Rule 28(c).

Issues Presented for Review

1. Whether the district court abused its discretion in denying plaintiff's oral motion for class certification in this employment discrimination case when he was not represented by counsel.

2. Whether the district court erred in dismissing plaintiff's purported class action employment discrimination complaint when plaintiff refused to participate in discovery on his individual claim of race and gender discrimination.

Statement of the Case

On August 11, 2006, Daniel L. Miles filed a *pro se*, class-action employment discrimination complaint in district court alleging that the Nuclear Regulatory Commission discriminated against a class of black males based on their sex and race over a 31-year period. R. 1. The agency answered the complaint on November 2, 2006. R. 12.

At the status hearing held on January 17, 2007, the district court denied Miles' oral motion for class certification. R. 24-3 at 4-6; R. 15. Given Miles' insistence that he wished only to proceed with his class case, unrepresented by counsel, and his refusal to participate in discovery on his individual case, the district court

dismissed his complaint. R. 8-9; R. 15. Judgment was entered on January 18, 2007.

On March 14, 2007, Miles filed a timely notice of appeal. R. 17.

Statement of Facts

Daniel L. Miles is an employee of the Nuclear Regulatory Commission. Miles filed this *pro se* lawsuit claiming that the Nuclear Regulatory Commission engaged in a pattern of discriminatory hiring and promotion of black males over a 31-year period by failing to hire or promote members of the class based on their race and gender. R. 1.

At the first status hearing, held October 19, 2006, the district court informed Miles that a motion for class certification was premature. R. 24-1 at 4. "[A]t least presently, the case is not a class case. It is only Mr. Miles' own individual claim that we need to deal with . . . ; even before we get to any class questions, we deal with the individual allegations." *Id.* at 4-5. The agency answered the complaint. R. 12.

At the next status hearing, held on December 6, 2006, Miles again informed the court that he was not pursuing an individual case against the agency, only a class action. R. 24-2 at 5-6 ("It seems as though you gave me the impression that I had filed an individual complaint against defendant . . . That is not the case here"; "I did not — I have

not — filed an individual case."). The court advised Miles that in order to represent anyone else in a class, he first needed to establish his own claim. R. 24-2 at 6-7. The court also noted that Miles could afford counsel, but Miles stated that he was unsuccessful in retaining counsel. R. 24-2 at 4. Miles was granted additional time to retain counsel. R. 24-2 at 4; R. 14.

At a status hearing held on January 17, 2007, Miles told the court that he was unsuccessful in retaining counsel, again orally requested class certification and informed the district court that he did not wish to pursue any individual claim. R. 24-3 at 3, 4, 6. The court orally denied the motion for class certification repeatedly. R. 24-3 at 4, 6, 7. Miles indicated that without class certification, he would not proceed. R. 24-3 at 6 ("I filed this as a class action. If you are not going to certify it, there is not further — I mean, where can we go with this?"). When the court asked Miles whether he wanted the case dismissed, Miles responded: "Well, if you're not going to certify a class . . . [t]hen I can go to, hopefully, the Court of Appeals." R. 24-3 at 6. By written order entered on January 18, 2007, the district court denied the motion for class certification and dismissed the complaint because of Miles' refusal to pursue his individual case. R. 15.

Summary of Argument

Miles insisted that his complaint was *only* a class action claim, not an individual claim of discrimination. A *pro se* plaintiff cannot represent a class without counsel, and Miles was not represented by counsel despite being given the opportunity to retain counsel. Miles repeatedly declined to litigate his individual discrimination claims, even though Miles would have had to establish that he had a legitimate claim to establish standing to bring a class action. The district court did not abuse its discretion in dismissing the complaint. Because the district court did not proceed to the point of evaluating the question of class certification, this court need not review the elements of class certification. If this court were to find that the case was improperly dismissed, the case would have to be remanded for Miles to obtain counsel if possible and move for class certification, and to allow the court to assess the elements of class certification.

Alternatively, the district court did not abuse its discretion in dismissing Miles' complaint due to his failure to participate in discovery. Miles' insistence on proceeding only with his class action complaint resulted in the dismissal of his case. He should not get another bite at the apple. The district court properly and repeatedly advised Miles to proceed with discovery on his individual claim of

discrimination, so that if he made out an individual case, the court might address class certification.

Argument

I. A *Pro Se* Plaintiff Cannot Represent a Class.

A. Standard of Review

The district court's denial of class certification is reviewed for an abuse of discretion. *Mira v. Nuclear Management Corp.*, 107 F.3d 466, 474 (7th Cir. 1997).

B. Miles Could Not Represent a Class.

The district court did not abuse its discretion in denying Miles' oral motion for class certification. It is well settled that class members cannot be represented by nonlawyers. *U.S. ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004)(policy forbids "litigants, whether they are corporations, or other organizations, or individuals, such as members of a class or shareholders, to be represented by nonlawyers"). This basic policy is found, for example, in the local rules of the district court. LR 83.12 ("only members in good standing of the general bar of this Court may enter appearance of parties"). The district court had no discretion but to deny *pro se* plaintiff Miles' motion. Miles has no answer to this conundrum; instead, his brief argues that the district court should have certified a class based on numerosity, commonality, etc., all of which misses the point that *Miles* could not make those arguments on behalf of a

class that as a nonlawyer he was not permitted to represent. The district court did not explicitly invoke this principle in dismissing Miles' complaint, but this court may affirm the district court's decision on any ground supported by the record. *Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773 (7th Cir. 1995).

Under Rule 23(a)(4), a named plaintiff must be able to provide the class with adequate representation. Fed. R. Civ. P. 23(a)(4). A litigant may bring his own claims to federal court without counsel, but not the claims of others. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004)(standing encompasses the general prohibition on a litigant's raising another person's legal rights). This is so because the competence of a layman is "clearly too limited to allow him to risk the rights of others." *Fymbo v. State Farm*, 213 F.3d 1320, 1321 (10th Cir. 2000)(a non-attorney may not bring a class action lawsuit because a layman is "clearly too limited to allow him to risk the rights of others."), quoting *Oxendine v. Williams*, 509 F.2d 1405, 1407 (4th Cir. 1975)(holding that it would be plain error to permit an imprisoned *pro se* litigant to represent his fellow inmates in a class action); 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1769.1 and n.12.

As a *pro se* plaintiff, Miles could have litigated his own individual discrimination claims — something he specifically and repeatedly declined to do — but he cannot litigate on behalf of other purported class members. Miles offers no reason for this court to deviate from the rule. The district court advised Miles to pursue his individual case first, stating that class certification was premature.
R. 24-2 ("Because if you do not have a claim, you cannot speak on behalf of anybody else. You have to speak on your own behalf in the first instance."). Where the named plaintiff cannot demonstrate a legitimate claim, the representative lacks proper standing to bring any class allegations. *Davis v. Ball Memorial Hospital Ass'n*, 640 F.2d 30 (7th Cir. 1980). Miles refused to do so, instead insisting on certification of the class. Miles Br. at 4 ("Plaintiff-Appellant stated that the lawsuit was filed as a class action, and not as an individual action.").

After giving Miles an opportunity to find a lawyer, and because Miles repeatedly refused to proceed with his individual case, the district court properly dismissed Miles' complaint because nonattorney Miles was barred from representing class members. *See Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

Miles' appellate brief addresses in great detail the elements that a district court should consider in certifying a

class. The district court in this case properly did not get that far — telling Miles it was premature to certify the class before any discovery on his individual claim. Should this court find that Miles' complaint was dismissed improperly, it should be remanded to allow Miles to obtain counsel and move for class certification, and to allow the district court to assess the elements of class certification.

In response to defendant-appellee's motion for summary affirmance, Miles asserted that the transcripts of the three status hearings are "tainted." Miles Response to Motion for Summary Affirmance at 1. Specifically, Miles stated that the "transcripts do not correctly reflect the statements actually made during the status hearings held in the District Court (the transcripts reveal modified, omitted, and unexpressed statements)." *Id.* Miles "anticipated that the transcripts might not be correct, given the nature of this case and the hardship that Plaintiff-Appellant endured." *Id.* at 1-2. Miles apparently now realizes that his own words at the status hearings doom his case.[2] The certified transcripts speak for themselves, and Miles' assertions of misdeeds are unsupported. His refusal to proceed caused his case to be dismissed.

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[2] Miles own brief on appeal repeatedly labels his claim a "class action complaint." Miles Br. at 3.

II. Failure to Prosecute

A. Standard of Review

The district court's dismissal of Miles' complaint for failure to prosecute is reviewed for an abuse of discretion. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962).

B. The District Court Did Not Abuse Its Discretion in Dismissing Miles' Complaint Pursuant to Its Inherent Authority.

The district court did not abuse its discretion in dismissing Miles' complaint for failure to prosecute. District courts have inherent authority to dismiss a case *sua sponte* for a plaintiff's failure to prosecute. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *see In re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995). While the district court enjoys the inherent authority to dismiss the case, much of the rationale embodied in Federal Rule of Civil Procedure 41(b) applies. *See Daniels v. Brennan*, 887 F.2d 783, 785 n.3 (7th Cir. 1989).

The district court's dismissal will not be set aside unless it is clear that no reasonable person could concur in the trial court's assessment of the issue under consideration. *3 Penny Theater Corp. v. Plitt Theaters, Inc.*, 812 F.2d 337, 339 (7th Cir. 1987). This court must examine the procedural history of the case and the situation at the

time of the dismissal. *Pyramid Energy Ltd. v. Heyl & Patterson*, 869 F.2d 1058, 1061 (7th Cir. 1989). It is not the function of this court to "re-exercise the trial judge's discretion but rather to determine if that exercise of discretion was unreasonable." *Daniels*, 887 F.2d at 787. The imposition of lesser sanctions is not a prerequisite to dismissal. *Patterson v. Coca-Cola Bottling Co.*, 852 F.2d 280, 284 (7th Cir. 1988)(choice of appropriate sanction is left to trial court).

Miles argues on appeal that there was no bad faith or lack of diligence on his part to merit dismissal. Miles Br. at 6. The three transcripts belie that argument. The district court informed Miles at each of the three status hearings that Miles must proceed first with his individual claim and that class certification was premature. The court explained that only if Miles could show that his own claim was substantiated could he then ask to represent others in a class. At each status hearing, Miles adamantly insisted that he was not interested in pursuing his individual case. Because Miles was not able to retain counsel and refused to participate in discovery on his individual claim, the district court did not abuse its discretion in dismissing his

complaint.[3]

Conclusion

For the foregoing reasons, the decisions of the district court should be affirmed

Respectfully submitted,

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[3] The district court could also have dismissed Miles' complaint as a sanction for his refusal to participate in discovery. Such a dismissal would not have been an abuse of its discretion. *Dotson v. Bravo*, 321 F.3d 663, 666-67 (7th Cir. 2003).

No. 07-1596

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DANIEL L. MILES,
PLAINTIFF-APPELLANT,

v.

DALE E. KLEIN, SUCCESSOR TO NILS J. DIAZ, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CASE NO. 06-CV-04351
THE HONORABLE JUDGE CHARLES P. KOCORAS

REPLY BRIEF OF PRO SE PLANTIFF-APPELLANT

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Rule 23.....2
Rule 23 (a).....2
Rule 23 (b).....2
Rule 41 (a).....1
Rule 41 (a)(1).....1
Rule 41 (a)(2).....1
Rule 41 (b).....1, 2

ARGUMENT

In response to Defendant-Appellee's arguments with respect to failure to prosecute, class certification, standing and other things (Brief of Defendant-Appellee at 4-8), Plaintiff-Appellant argues the followings:

1. The District Court dismissed the case sua sponte, and its dismissal for Plaintiff-Appellant's lack of desire to pursue the case can be fairly regarded as a "dismissal for want of prosecution." Rule 41(b) of the Federal Rules of Civil Procedure addresses the involuntary dismissal of an action and claim and provides:

> "Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

"Rule 41(a) makes clear that 'an adjudication upon the merits' in Rule 41(b) is the opposite of a dismissal

without prejudice--that is, it is a dismissal that prevents refiling of the claim in the same court." *Semtek International, Inc. v. Lockheed Martin Corp.* 531 U.S. 497, 498 (2001).

Given that Plaintiff-Appellant had neither filed a notice or stipulation of dismissal nor made a request for dismissal under Fed. R. Civ. P. 41 (a)(1) or (2), and given that it was not otherwise specified, the District Court's dismissal for want of prosecution operated as an "adjudication upon the merits." The Seventh Circuit stated in the case of *In re Bluestein & Co.*, 68 F.3d 1022, 1025 (7th Cir. 1995): "Dismissal for want of prosecution is an undeniably harsh sanction, having the procedural effect of an adjudication on the merits against the plaintiff. See FED. R. CIV. P. 41(b). This severity requires that district courts resort to dismissal only in extreme situations, when there is a clear record of delay or contumacious conduct, or when other less drastic sanctions have proven unavailable." GCIU Employer Retirement Fund v. Chicago Tribune, 8 F.3d 1195, 1199 (7th Cir. 1993) (quoting Pyramid Energy, Ltd. v. Heyl & Patterson, Inc., 869 F.2d1058, 1061 (7th Cir. 1989)). See also Northern District Court of Illinois Local Rule 41.1. It is inescapably clear that there is nothing in the record to show bad faith, failure, or a lack of diligence to

meet deadlines or any contumacious conduct by Plaintiff-Appellant.

2. In the case of *Payton v. Kane County*, 308 F.3d 673, 680 (7th Cir. 2002), the Seventh Circuit explained: "....our analysis with the question of class certification, mindful of the Supreme Court's directive to consider issues of class certification prior to issues of standing. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999):

> 'the class certification issues are...logically antecedent to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing. Thus the issue about Rule 23 certification should be treated first.' *Id.* at 831. This involves defining the class and assessing whether the proposed class representatives can satisfy all four requirements of Rule 23(a), and at least one of the categories of Rule 23(b)."

Moreover, the Seventh Circuit stated: "We understand *Ortiz* to rest on the longstanding rule that, once a class is properly certified, statutory and Article III standing requirements must be assessed with reference to the class as a whole, not simply with reference to the individual named plaintiffs. The certification of a class changes the standing aspects of a

suit, because [a] properly certified class has a legal status separate from and independent of the interest asserted by the named plaintiff." *Payton,* 308 F.3d. at 680.

3. "Article III requires that the plaintiff has suffered an 'injury in fact' which is fairly traceable to the challenged action of the defendant and 'likely,' as opposed to merely speculative,' to be 'redressed by a favorable decision.' " *Doe v. County of Montgomery,* 41 F.3d 1156, 1159 (7th Cir. 1994); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); see *Kyles v. J.K. Guardian Security Services, Inc.,* 222 F.3d 289, 292-304 (7th Cir. 2000) (analysis of standing under Title VII); see also *Tarpley v. Jeffers,* 96 F.3d 921, 923-24 (7th Cir. 1996) (unsuccessful job applicant would have standing if he could demonstrate that he would have been "able and ready" to apply for the position but was prevented from doing so by the challenged employment practice) (quoting *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville,* 508 U.S. 656, 666 (1993)). It is clear from the "language of the filed class-action complaint" that these requirements are satisfied, and it is also clear from such language that Plaintiff-Appellant alleges, among others, a real and immediate threat of repeated injury. "Past wrongs are evidence bearing on whether there is a real and

immediate threat of repeated injury." *O'Shea v. Littleton*, 414 US 488, 496 (1974).

4. During the initial status hearing held October 19, 2006, there was no discussion of class certification.

5. At no time during any status hearing did Plaintiff-Appellant inform the District Court of his wish not to pursue his individual claims. The "language of the filed class-action complaint" supports this argument, as such language clearly shows that Plaintiff-Appellant seeks (or has been seeking) to litigate his individual claims of discrimination in a class-action context.

6. The transcripts received after the filing of Plaintiff-Appellant's brief are tainted. The transcripts do not correctly reflect the statements actually made during the status hearings held in the District Court (the transcripts reveal modified, omitted, and unexpressed statements).

In conjunction to the hardship that Plaintiff-Appellant endured in the District Court, and since the filing of the notice of appeal (March 14, 2007) and before the filing of Plaintiff-Appellant's brief (April 24, 2007), Plaintiff-Appellant made two personal appearances before and several phone calls to the District Court Reporter with no avail in Plaintiff-Appellant's attempts to receive the transcripts of the District Court proceedings. Approximately 10 minutes after the filing of Plaintiff-

Appellant's brief, Plaintiff-Appellant received a cell phone call informing him that the transcripts were ready to be received. Had Plaintiff-Appellant received the transcripts with their current contents and in a reasonable amount of time prior to the filing of his initial brief, surely he would have disputed in said brief the contents of the transcripts.

CONCLUSION

Plaintiff-Appellant hereby urges reversal of the District Court's dismissal of the case and its denial of class certification. The appeal from denial of class certification is conditional on this Court of Appeals' reversing the dismissal of the case. Plaintiff-Appellant requests of this Court of Appeals to retain jurisdiction over this case or controversy in the interests of judicial economy and justice. The District Court had an opportunity to consider and decide each element of Plaintiff-Appellant's written motion for class certification.

Respectfully submitted,

s/ Daniel L. Miles
Daniel L. Miles
17 North Taft Ave.
Hillside, IL 60162
Telephone: (708) 449-0379
E-mail: dlmiles@comcast.net

Dated: July 23, 2007

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001
May 10, 2006

Daniel L. Miles
17 N. Taft Avenue
Hillside, IL 60162

RE:

Dear Mr. Miles:

May 10, 2006

FINAL ORDER IN DISCRIMINATION COMPLAINT
AGENCY NO. NRC-06-07, EEOC NO. 440-2006-00055X

Enclosed is the U.S. Nuclear Regulatory Commission's (Agency) Final Order in the above referenced discrimination complaint.

The Order Entering Judgement (Order), dated April 28, 2006, issued by Administrative Judge Young B. Kim, U.S. Equal Employment Opportunity Commission (EEOC), was received in the Office of Small Business and Civil Rights (SBCR) on May 1, 2006. The Agency is fully implementing the Order issued by the Administrative Judge. The Administrative Judge denied your petition for class certification and remanded the case to the Agency to be processed as an individual complaint of race

(African-American) and gender (male) discrimination in accordance with 29 CFR § 1614.

This constitutes the Agency's final action in this matter. If you disagree with the Agency's decision to implement the Administrative Judge's Order, you may exercise the appeal rights set forth in the Agency's Final Order.

If you have questions, you may contact Lori Suto-Goldsby, Civil Rights Program Manager, SBCR, at 301-415-0590 (e-mail: lsq1@nrc.gov).

Enclosure: As stated

cc: Young B. Kim, EEOC

Sincerely,

Corenthis B. Kelley, Director
Office of Small Business and Civil Rights

UNITED STATES NUCLEAR REGULATORY COMMISSION

DANIEL L. MILES
Complainant

v.

Agency Case No. NRC-06-07
EEOC Case No. 440-2006-00055X

NILS J. DIAZ, CHAIRMAN,
U.S. NUCLEAR REGULATORY
COMMISSION
Agency

FINAL ORDER

Pursuant to U.S. Equal Employment Opportunity Commission (EEOC) regulation at 29 CFR §1614.204(d)(7), this is notice that the U.S. Nuclear Regulatory Commission (NRC or Agency) is fully implementing the decision of Administrative Judge Young B. Kim (Administrative Judge) in the above referenced complaint filed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et. seq. (Title VII).

The Administrative Judge's Decision regarding your petition for class certification, dated April 28, 2006, was received in the Office of Small Business and Civil Rights (SBCR), on May 1, 2006. The Administrative Judge denied your petition for class certification and remanded the case to the Agency to be processed as an individual complaint of race (African American) and gender (male) discrimination in accordance with 29 CFR § 1614. Accordingly, your

complaint will be processed by the Agency as an individual complaint and deemed filed on April 28, 2006.

This constitutes the Agency's final action in this matter regarding the class complaint you filed on February 3, 2006. If you are dissatisfied with the Agency's decision to fully implement the Administrative Judge's Decision, you may file an appeal with the EEOC or a civil action in an appropriate U.S. District Court. The procedures and time limits for filing an appeal and/or a civil action are set forth below:

APPEAL RIGHTS

In accordance with 29 CFR §1614.402(a), if you elect to file an appeal, the appeal must be filed within 30 calendar days of receipt of the Agency's Final Order.

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

Daniel L. Miles, on own behalf and on behalf of others, Plaintiff(s), vs.	**Class Action** **Civil No.:** 06 4351
Dale E. Klein, successor to Nils J. Diaz, Chairman, U.S. Nuclear Regulatory Commission, Defendant(s).	

COMPLAINT AND DEMAND FOR JURY TRIAL

This is a class-action complaint of a pattern or practice of race and sex discrimination brought under Title VII of the Civil Rights Act of 1964, as amended; in that I believe I have been discriminated against because of my race and sex, Black male.

This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, 1343(a) (4), 2201, and 2202, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, as amended, and the Civil Rights Act of 1991. Venue is proper in this judicial district pursuant to 42 U.S.C. § 2000-5(f) (3).

Introduction

Region 3 of the U.S. Nuclear Regulatory Commission, located in Lisle, IL, has been carrying out part of its operations, for an estimated time period of 31 years, with a middle finger thrown up at Title VII of the Civil Rights Act of 1964, as amended and other laws. The statements set forth under the section of allegations of race and sex discrimination in this complaint should paint a clear picture in one's mind as to what has been part of Region 3's operations. As a note, the U.S. Nuclear Regulatory Commission and its Region 3 office were initially opened for business on or above January 19, 1975.

I, Daniel L. Miles, have been employed by Region 3 as a grade 12 Information Technology Specialist (Applications Software/ Data Management) since January 27, 2002. Prior to being hired by Region 3, I had worked there as a federal contractor for approximately three years. I have exhausted my administrative remedies and fulfilled all conditions precedent to filing this suit, and have received on May16, 2006 the right to file a civil action in federal court.

Facts Relating To The Alleged Discrimination

Prior to 11/4/2005, on many occasions during the course of my employment since 1/27/2004, and during my quarterly and end-of-year reviews, I had repeatedly

requested to be promoted from a GG-12 to a GG-13 within my occupied position. Such requests were made to my former Branch Chief who in turn stated that he would bring my requests to the attention of B.J. Holt, Director of the Division of Resource and Management Administration. As a note, during the year 2004, I expressed, to my co-workers and former Branch Chief, my desire and intention to apply for a posted Communication Specialist GG-13 position. Because of the negative responses that I had received, I decided not to apply for the position of which a white male was subsequently selected. An actual application from me for the posted position would have been a futile one; therefore, I decided to continue to request to be promoted within my occupied position.

The number of times that my former Branch Chief mentioned to B.J. Holt of my requests to be promoted is uncertain. However, it was not until a day in the month of March or April of 2005 when B.J. Holt appeared in my office and stated, "Dan you need to move to Headquarters (U.S. NRC Headquarters) if you want to obtain a 14 position." To her I stated, "I do not want to move to Headquarters considering the higher cost of living in its surrounding areas." U.S. NRC Headquarters is located in Rockville, Maryland, and Region 3 of the U.S. NRC is located in Lisle, Illinois. I asked myself two questions

during that moment, why did she skip 13 and mention a 14 position? And why must I move to Headquarters to obtain a 14 position? I was seeking to be promoted to a GG-13 within my occupied position at Region 3. Nevertheless, other conversations were carried on during that time but nothing pertaining to whether or not a promotion would be granted. Since that time and until something was heard from B.J. Holt regarding a promotion, I decided to work harder, as always, to improve my performance rating and to increase my chances of being promoted.

On 11/4/2005, I was given my 2005 performance appraisal signed by B.J. Holt. In such appraisal and to my astonishment, I noticed that my performance rating had decreased to 3.25 from 3.5 as opposed to increased or remained the same as my 2004 performance rating (given that there was no appointed and sworn Branch Chief on board in the Information Resources Branch for the third and fourth quarters of the 2005 fiscal year). I worked very hard in the performance of my duties, especially given the fact that I was seeking to be promoted.

Although the given performance appraisal denoted excellent performance, the performance rating indicated a decrease in performance and thus not warranted for me to be selected to receive and presented with a performance award. That effect, in my belief, was intentional. As a

discriminatory preference, all white males, if not a majority, at GG-8 and above, and under the direction of B.J. Holt, received increased or same performance ratings when compared to their 2004 performance ratings (not including the one on probation, given that this 2005 year was his first performance rating period). Two Black males, at GG-12 and GG-13, and under the direction of B.J. Holt, received downgraded performance ratings when compared to their 2004 performance ratings.

It was also on this date, 11/4/2005, that I realized just what B.J. Holt meant by the statement she made that day in the month of March or April of 2005: "My sought-after promotion was not going to happen while at Region 3." My downgraded performance rating, along with the realized statement, conveyed to me that my requested promotion was denied. And it reasonably can be deduced from her statement that any promotion was foreclosed for me at Region 3.

On 12/5/2005, and as another discriminatory preference, all white males, if not a majority, at GG-8 and above, and under the direction of B.J. Holt, received performance awards or better (including the one on probation). None of the Black males, at GG-12 and GG-13, and under the direction of B.J. Holt, received such awards. Furthermore, the one who received a performance award

while on probation is very likely to be selected to receive and presented with such an award in the year 2006. Each year of my two years (2002 and 2003) while on probations, I asked why I did not receive a performance award. I was told because I was on probation and not because of my job performance.

B.J. Holt, a black female, is mentioned in this complaint as a person (along with others) who had or has acted, and will continue to act, in furtherance of the alleged ongoing discriminatory policies. In addition, it is worth mentioning that Human Resources of Region 3 has been under the direction of B.J. Holt.

Allegations of Race and Sex Discrimination

A pattern or practice of resistance to Title VII

1. Prior to 11/4/2005, Defendant had been following hiring and promotion policies and an integrated practice of discrimination of disproportionately and purposefully excluding all, or substantially all, Black males, including myself, from Administrative, Professional, Supervisory, or Management positions on the basis of our race and sex at Region 3.
   a. Except for the discrimination, being hired or promoted would have provided an employment opportunity, among others, to receive training or

experience to qualify for, to be hired in, or to be promoted to a higher position, or to advance promotionally within occupied position, or to receive an unbiased performance appraisal of the performance of duties in occupied position, within any Division of Region 3, including the Division of Resource and Management Administration.

2. Such ongoing and longstanding discriminatory policies were unrelated to measuring job, or subsequent job, capability; whereas the effect was depriving me, as other Black males, of employment opportunities, and was causing me mental anguish.
3. As of 11/4/2005, Defendant had an estimated 205 employees at Region 3. Of these, 4 were Black males and approximately 100 were white males. Calculated roughly, 2 Black males (although considered professionals) were in Administrative positions; 2 Black males were in Professional positions; and no Black males were in Supervisory or Management positions (100% excluded).
4. As a result of Defendant's ongoing discriminatory policies that resulted in the rejection of a disproportionately greater percentage of Black males, I have been deprived of promotional and other

employment opportunities, and my performance-rating status as an employee has been adversely affected.

5. As a further result of Defendant's ongoing discriminatory policies that resulted in the rejection of a disproportionately greater percentage of Black males, my downgraded performance rating, in my 2005 performance appraisal, contributed to the disparity in treatment of Black males in being selected to receive and presented with a performance award on an equal basis as white males.
   a. No Black male was selected to receive and presented with a performance award during the 12/5-6/2005 Divisional and Regional award presentations.
   b. As I have indicated already, another Black male also was given a downgraded performance rating in his 2005 performance appraisal. Although he submitted a grievance to dispute the performance rating, such grievance was subsequently and unfortunately withdrawn.
6. Absence of a statistical showing of such, the ongoing discriminatory policies of Defendant have resulted in a disparate impact on Black males than on white males, since a disproportionately greater percentage of Black males were excluded from any of the positions mentioned in paragraph 1 than were white males; and,

in addition, such ongoing discriminatory policies have resulted in a disparate treatment which involved the refusal to hire and promote Black males on an equal basis with white males.

a. With respect to the disparate treatment, the refusal to hire and promote conformed to the pattern or practice of discrimination against Black males as shown in paragraph 1.

Class Certification

7. Plaintiff, as representative of the class, seeks class certification of this action. The class consists of current and former Black male employees and applicants for employment (including applicants who would have applied but for the discrimination), at Region 3 of the U.S. Nuclear Regulatory Commission, who had or have been, or are being adversely affected by Defendant's pattern or practice and/or discriminatory policies that denied or are denying them employment opportunities on the basis of their race and sex. From January 19, 1975 to the present is the relevant time period of the alleged discrimination. During the relevant time period of discrimination, Plaintiff has been subjected to the discrimination, as alleged, since his initial hire as a federal employee on January 27, 2002.

8. The class that Plaintiff, as a class member, seeks to certify satisfies the numerosity, commonality, typicality, and adequacy of representation prerequisites for certification under Fed. R. Civ. P. 23(a).

9. Numerosity, Fed. R. Civ. P. 23(a) (1): The members of the class identified in Paragraph 7 above are so numerous that joinder of all members is impracticable. Given the fact that Defendant sought, and is continuing to seek, employment of individuals from the general population for its Region 3 office, and the fact that the class consists of current and former Black male employees and applicants (including out-side applicants), it is difficult to determine the exact number of Black males who have or had been affected by the discrimination. Even a good-faith approximation of the number could not be attempted, given the fact that the issue in this matter involves an estimated 31 years of race and sex discrimination against Black males. In other words, "the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued abatement by the death of some would prevent or unduly delay a decree."

10. Commonality: Fed. R. Civ. P. 23(a) (2): This suit poses numerous questions of law and fact that are common to and affect the rights of all members of the class. The answers to these questions will be determined on the basis of common evidence that is applicable to each class member. This includes the utilization of statistical evidence as proof of Defendant's pattern or practice and/or discriminatory policies, expert testimony, as well as testimonies from class members that may serve as anecdotal evidence about specific instances that also illustrate the persistent pattern or practice of race and sex discrimination against Black males.

Specific examples of factual and legal commonality include, but are not limited to:

a. Common Questions of Fact and Law. Claims of Plaintiff and each class member implicate common factual questions including (without limitations) the following:

1. Whether Defendant has subjected Black males, including Plaintiff, to a pattern or practice of race and sex discrimination at its Region 3 office;

2. Whether Defendant has followed hiring and promotion policies and an integrated practice of discrimination of disproportionately and purposefully excluding all, or substantially all, Black males,

including Plaintiff, from Administrative, Professional, Supervisory, or Management positions on the basis of their race and sex at Region 3, which in turn implicates common questions concerning hiring and promotion; and

3. Whether Defendant has violated Title VII of the Civil Rights Act of 1964, as amended, and as alleged, under the disparate impact and disparate treatment theories, relating to whether Defendant's challenged pattern or practice and/or discriminatory policies that adversely affect Black males, including Plaintiff, can be justified as a "business necessity", and whether Defendant can provide "a nondiscriminatory explanation for the apparently discriminatory result."

b. The presence of central questions of fact and law that are common to Plaintiff and to each class member satisfies Rule 23(a) (2)'s commonality requirement.

11. Typicality: Fed. R. Civ. P. 23(a) (3): Plaintiff's claims are typical of the claims of the class members as a whole. Plaintiff possesses the same interest and suffers the same injury as the class members. Plaintiff and class members share a common interest in equal employment opportunities without discrimination on the basis [of] our race and sex, and suffer the same injury in

deprivation of equal employment opportunities on the basis of our race and sex. The claims of Plaintiff and the class arise out of common facts and similar legal and remedial theories. The relief Plaintiff seeks will benefit the class. Plaintiff and class members also share a common interest in assuring that Defendant ends its unlawful employment discrimination against Black males at its Region 3 office. This shared interest in remedying a shared injury through similar legal and remedial theories satisfies the typicality requirement of Rule 23(a) (3).

12. Adequacy of Representation: Fed. R. Civ. P. 23(a) (4): Plaintiff, or if represented by class counsel pursuant to Fed. R. Civ. 23 (g), will fairly and adequately protect the interests of the class. Plaintiff's interest and injury are coextensive with those of the class. Plaintiff seeks to end and remedy Defendant's pattern or practice and/or discriminatory policies so that the class will no longer suffer discrimination. Plaintiff is able and willing to represent the class fairly and vigorously as Plaintiff pursues this common goal through this action, and hereby states that there are no conflicts of interest between Plaintiff and the class. The coextensive interest and injury of Plaintiff with class members, along with the interest, resource, and trial experience of their class

counsel to litigate competently this class action suit of race and sex discrimination at issue here, satisfy the adequacy requirement of Rule 23(a)(4).

13. Federal R.Civ. P. 23(b) (2): Defendant has acted or refused to act in a manner generally applicable to the class. As indicated in paragraphs 1 through 6 above, and without limitations: Defendant has maintained a pattern or practice and/or discriminatory policies of treating Black males, including Plaintiff, less favorably than white males. Defendant's pattern or practice and/or discriminatory policies have resulted in a hierarchy dominated exclusively by white males with little or no employment opportunity for Black males, including Plaintiff. Defendant's system of decision-making has resulted in a disparate treatment of, and has resulted in a disparate impact on, Plaintiff and the class as a whole. These continuing pattern or practice and/or discriminatory policies are common to and typical of the claims of Plaintiff and class members and satisfy Rule 23(b) (2)'s requirement that Defendant has acted in a manner generally applicable to the class.

14. Fed. R. Civ. P. 23(b) (2): The Appropriateness of Injunctive and Declaratory Relief to the Class. Plaintiff seeks declaratory relief that Defendant's pattern or practice and /or discriminatory policies, as alleged,

violate federal law; and injunctive relief designed to end and remedy the effect of the Defendant's pattern or practice and/or discriminatory policies. Such relief by its nature is applicable to the class as a whole and satisfies Rule 23(b) (2)'s requirement that injunctive and declaratory relief be appropriate.

15. Fed. R. Civ. P. 23(b) (3) Requirements. Class certification is also appropriate pursuant to Fed R. Civ. P. 23(b) (3) in this case because, as set forth in more detail in paragraphs above, common questions predominate over those affecting class members individually, and a class action is superior to other available methods of resolving this controversy. The alternative to class treatment is certainly numerous individual suits. Such a multiplicity of actions would defeat the economies of scale inherent in the class action procedure and result in substantial waste of judicial resources. Thus, from the viewpoint of public policy, transactional costs and judicial economy, multiple litigations would be manifestly inferior to a class action, thereby satisfying Fed. R. Civ. P. 23(b) (3).

Jury Demand

16. A trial by jury is hereby demanded in this action for all issues triable by right.

Prayer for Relief

17. Wherefore, Plaintiff on own behalf and on behalf of the class members whom he seeks to represent requests the following relief:

18. Appointment of class counsel pursuant to Fed. R. Civ. 23 (g).

19. Certification of the case as a class action pursuant to Fed. R. Civ. 23 (b) (2) and/or 23 (b) (3) on behalf of the Plaintiff's class and designation of Plaintiff as representative of the class and their counsel, if counsel is appointed by the Court pursuant to Fed. R. Civ. 23 (g), of record as Class Counsel.

20. A declaratory judgment that Defendant's pattern or practice and/or discriminatory policies against Plaintiff and the class are unlawful and in violation of Title VII of the Civil Rights Act of 1964, as amended.

21. An award of back pay; interest on back pay; front pay; damages for lost compensation and job benefits that the Plaintiff and the class he seeks to represent would have received but for Defendant's discrimination; and compensatory damages and such other and further relief as appropriate.

22. An order enjoining Defendant from engaging in each of the proven discriminatory policies/practices against Plaintiff and the class, and requiring Defendant to institute and carry out policies, practices and programs for its Region 3 office that remedy the effect of past and present unlawful employment practices. An order prohibiting Defendant and its Region 3 office from retaliating, in any forms, against Plaintiff or any of Plaintiff's class members.
23. Reasonable attorney and expert witness fees and costs and expenses of suit.

Relevant U.S. Supreme Court Cases

24. Teamsters v. United States, 431 U.S. 324 (1977) and Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Pro se Plaintiff,

s/ Daniel L. Miles
Daniel L. Miles

Date: 08/11/2006

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United States Nuclear Regulatory Commission, Region 3

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DANIEL L. MILES,
Plaintiff,

v. No. 06 C 4351

DALE E. KLEIN, SUCCESSOR TO NILS J. DIAZ, CHAIRMAN, U.S. NUCLEAR REGULATORY COMMISSION,
Defendant. Judge Kocoras

ANSWER

Defendant, Dale E. Klein, the Chairman of the United States Nuclear Regulatory Commission, by his attorney, Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, answers the complaint as follows:

1. This is class-action complaint of a pattern or practice of race and sex discrimination brought under Title VII of the Civil Rights Act of 1964, as amended; in that I believe I have been discriminated against because of my race and sex, Black male.

Answer: Defendant admits plaintiff s complaint alleges race and sex discrimination[1]

2. This Court has jurisdiction over this action pursuant to 28 U. S.C. § 1331, 1343(a) (4), 220 1, and 2002, Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000(e) et seq. as amended, the Civil Rights Act of 1991. Venue is proper in this judicial district pursuant to 42 U. S.C. § 20005(f) (3).

Answer: Defendant admits this court has jurisdiction and that venue is proper.

3. Region 3 of the U.S. Nuclear Regulatory Commission, located in Lisle, IL, has been carrying out part of its operations, for an estimated time period of 31 years, with a middle finger thrown up at Title VII of the Civil Rights Act of 1964, as amended and other laws. The statements set forth under the section of allegations of race and sex discrimination in this complaint should paint a clear picture in one's mind as to what has been part of Region 3's operations. As a note, the U.S. Nuclear Regulatory Commission and its Region 3 office were initially opened for business on or above January 19, 1975.

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[1]Plaintiff's complaint does not begin numbering its paragraphs until page 3, beginning with the heading "Allegations of Race and Sex Discrimination." For purposes of this answer, defendant numbers the paragraphs from the first allegation, irrespective of the paragraph numbers designated by the Plaintiff on pages 3-6 of complaint.

Answer: Defendant denies the allegations in the first two sentences of paragraph 3. Defendant admits that the NRC was created on January 19, 1975.

4. I, Daniel L. Miles, have been employed by Region 3 as a grade 12 Information Technology Specialist (Applications Software/Data Management) since January 27, 2002. Prior to being hired by Region 3, I had worked there as a federal contractor for approximately three years. I have exhausted my administrative remedies and fulfilled all conditions precedent to filing this suit, and have received on May 16, 2006 the right to file a civil action in federal court.

Answer: Defendant denies the statements in the first sentence of Paragraph 4 of the complaint to the extent that plaintiffs employment with the NRC began January 28, 2002, not January 27, 2002. Defendant admits the third sentence of Paragraph 4.

Plaintiff has exhausted his administrative remedies with respect to his class complaint. His class complaint proceeded to the EEOC, where the EEOC Administrative Judge denied the class complaint and remanded the case to the agency for exhaustion of the individual complaint. In addition, plaintiff's individual complaint alleging race and

gender discrimination is properly before this court as over 180 days have now elapsed since it was deemed to have been filed. 180 days had not elapsed at the time the complaint was filed.

5. Prior to 11/4/2005, on many occasions during the course of my employment since 1/27/2004, and during my quarterly and end-of-year reviews, I had repeatedly requested to be promoted from a GG 12 to a GG 13 within my occupied position. Such requests were made to my former Branch Chief who in turn stated that he would bring my requests to the attention of B.J. Holt, Director of the Division of Resource and Management Administration. As a note, during the year 2004, I expressed, to my co-workers and former Branch Chief, my desire and intention to apply for a posted Communication Specialist GG 13 position. Because of the negative responses that I had received, I decided not to apply for the position of which a white male was subsequently selected. An actual application from me for the posted position would have been a futile one; therefore, I decided to continue to request to be promoted within my occupied position.

Answer: The Defendant is without knowledge or information sufficient to form a belief as to the truth of paragraph 5 of the complaint.

6. The number of times that my former Branch Chief mentioned to B.J. Holt of my requests to be promoted is uncertain. However, it was not until a day in the month of March or April of 2005 when BJ. Holt appeared in my office and stated, "Dan you need to move to Headquarters (U.S. NRC Headquarters) if you want to obtain a position." To her I stated, "I do not want to move to Headquarters considering the higher cost of living in its surrounding areas." U.S. NRC Headquarters is located in Rockville, Maryland, and Region 3 of the U.S. NRC is located in Lisle, Illinois. I asked myself two questions during that moment, why did she skip 13 and mention a 14 position? And why must I move to Headquarters to obtain a 14 position? I was seeking to be promoted to a GG 13 within my occupied position at Region 3. Nevertheless, other conversations were carried on during that time but nothing pertaining to whether or not a promotion would be granted. Since that time and until something was heard from B.J. Holt regarding a promotion, I decided to work harder, as always, to improve my performance rating and to increase my chances of being promoted.

Answer: With the exception of the fourth sentence therein, the defendant is without knowledge or information

sufficient to form a belief as to the truth of paragraph 6 of the complaint and so it is denied. Defendant admits the fourth sentence of paragraph 6 as to the location of the NRC Headquarters and Region III Regional Office.

7. On 11/4/2005, 1 was given my 2005 performance appraisal signed by BJ Holt. In such appraisal and to my astonishment, I noticed that my performance rating had decreased to 3.25 from 3.5 as opposed to increased or remained the same as my 2004 performance rating (given that there was no appointed and sworn Branch Chief on board in the Information Resources Branch for the third and fourth quarters of the 2005 fiscal year). I worked very hard in the performance of my duties, especially given the fact that I was seeking to be promoted.

Answer: Defendant admits that on November 4, 2005, Plaintiff was given his performance appraisal, signed by Jeffrey A. Foltz, Chief, Information Resources Branch (plaintiff s direct supervisor) and by Brenda J. Holt, Director, Division of Resource Management and Administration (reviewer and Plaintiff's second-line supervisor), for the period between October 1, 2004 and September 30, 2005. Defendant further admits that plaintiff's summary performance rating for this period of

time was Excellent (3.25). Defendant further admits that plaintiff's summary performance rating for the period between October 1, 2003 and September 30, 2004 (the previous year) was also Excellent (3.50). Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 7.

8. Although the given performance appraisal denoted excellent performance, the performance rating indicated a decrease in performance and thus not warranted for me to be selected to receive and presented with a performance award. That effect, in my belief, was intentional. As a discriminatory preference, all white males, if not a majority, as GG-8 and above, and under the direction of B.J. Holt, received increased or same performance ratings when compared to their 2004 performance ratings (not included the one on probation, given that this 2005 year was his first performance rating period.) Two Black males, at GG 12 and GG 13, and under the direction of B.J. Holt, received downgraded performance ratings when compared to their 2004 performance ratings.

Answer: With respect to the first three sentences in paragraph 8, defendant denies the allegations made. With respect to the fourth sentence in paragraph 8, defendant

admits that plaintiff and Rodney Butler both had Ms. Holt as their second-line supervisor. Defendant further admits that the numerical values from which their summary performance ratings were derived decreased in FY 2005 as compared to FY 2004, and that Mr. Butler had his performance rating decreased from "Excellent" in FY 2004 to "Fully Successful" in FY 2005. Defendant denies the remaining allegations of paragraph 8.

9. It was also on this date, 11/4/2005, that I realized just what B. J. Holt meant by the statement she made that day in the month of March or April of 2005: "My sought-after promotion was not going to happen while at Region 3." My downgraded performance rating, along with the realized statement, conveyed to me that my requested promotion was denied. And it reasonable can be deduced from her statement that any promotion was foreclosed for me at Region 3.

Answer: Defendant is without knowledge or information sufficient to form a belief as to the truth of paragraph 9.

10. On 12/5/2005, and as another discriminatory preference, all white males, if not a majority, at GG 8 and above, and under the direction of B.J. Holt, received performance

awards or better (including the one on probation). None of the Black males, at GG 12 and GG 13, and under the direction of B.J. Holt, received such awards. Furthermore, the one who received a performance award while on probation is very likely to be selected to receive and presented with such an award in the year 2006. Each year of my two years (2002 and 2003) while on probations, I asked why I did not receive a performance award. I was told because I was on probation and not because of my job performance.

Answer: Defendant denies the first sentence of paragraph 10 and admits the second sentence of paragraph 10. Defendant is without knowledge or information sufficient to form a belief as to the truth of the third, fourth, and fifth sentences of paragraph 10.

11. B.J. Holt, a black female, is mentioned in this complaint as a person (along with others) who had or has acted, and will continue to act, in furtherance of the alleged ongoing discriminatory policies. In addition, it is worth mentioning that Human Resources of Region 3 has been under the direction of B.J. Holt.

Answer: Defendant admits that BJ Holt is a black female. Defendant admits the second sentence of paragraph 11.

12. Prior to 11/4/2005, Defendant had been following hiring and promotion policies and an integrated practice of discrimination of disproportionately and purposefully excluding all, or substantially all, Black males, including myself, from Administrative, Professional, Supervisory, or Management positions on the basis of our race and sex at Region 3.

a. Except for the discrimination, being hired or promoted would have provided an employment opportunity, among others, to receive training or experience to qualify for, to be hired in, or to be promoted to a higher position, or to advance promotionally within occupied position, or to receive an unbiased performance appraisal of the performance of duties in occupied position, within any Division of Region 3, including the Division of Resource and Management Administration.

Answer: Defendant denies paragraph 12 of the complaint in its entirety, including subheading (a).

13. Such ongoing and longstanding discriminatory policies were unrelated to measuring job, or subsequent job,

capability; whereas the effect was depriving me, as other Black males, of employment opportunities, and was causing the mental anguish.

Answer: Defendant denies paragraph 13.

14. As of 11/4/2005, Defendant had an estimated 205 employees of Region 3. Of these, 4 were Black males and approximately 100 were white males. Calculated roughly, 2 Black males (although considered professionals) were in Administrative positions; 2 Black males were in Professional positions; and no Black males were in Supervisory or Management positions (100% excluded).

Answer: Defendant admits the first two sentences of paragraph 14. Defendant denies the third sentence of paragraph 14.

15. As a result of Defendant's ongoing discriminatory polices that resulted in the rejection of a disproportionately greater percentage of Black males, I have been deprived of promotional and other employment opportunities and my performance rating status as an employee had been adversely affected.

Answer: Defendant denies paragraph 15 of the complaint.

16. As a further result of Defendant's ongoing discriminatory policies that resulted in the rejection of a disproportionately greater percentage of Black males, my downgraded performance rating, in my 2005 performance appraisal, contributed to the disparity in treatment of Black males in being selected to receive and presented with a performance award on an equal basis as white males.

a. No Black male was selected to receive and presented with a performance award during the 12/5-6/2005 Divisional and Regional award presentations.
b. As I have indicated already, another Black male also was given a downgraded performance rating in his 2005 performance appraisal. Although he submitted a grievance to dispute the performance rating, such grievance was subsequently and unfortunately withdrawn.

Answer: Defendant denies paragraph 16 of the complaint, except subparagraph (b) of that Paragraph. With respect to subparagraph (b), defendant admits the first sentence of the subparagraph and is without

knowledge or information sufficient to form a belief as to the truth of the second sentence of the subparagraph.

17. Absence of a statistical showing of such, the ongoing discriminatory policies of Defendant have resulted in a disparate impact on Black males than on white males, since a disproportionately greater percentage of Black males were excluded from any of the positions mentioned in paragraph 1 than were white males; and, in addition, such ongoing discriminatory policies have resulted in a disparate treatment which involved the refusal to hire and promote Black males on an equal basis with white males.

a. With respect to the disparate treatment, the refusal to hire and promote conformed to the pattern or practice of discrimination against Black males as shown in paragraph

Answer: Defendant denies paragraph 17 in its entirety.

18. Plaintiff, as representative of the class, seeks class certification of this action. The class consists of current and former Black male employees and applicants for employment consists of current and former Black male employees and applicants for employment (including

applicants who would have applied but for the discrimination), at Region 3 of the U.S. Nuclear Regulatory Commission, who had or have been, or are being adversely affected by Defendant's pattern or practice and/or discriminatory policies that denied or are denying them employment opportunities on the basis of their race and sex. From January 19, 1975 to the present is the relevant time period of the alleged discrimination. During the relevant time period of discrimination, Plaintiff has been subjected to the discrimination, as alleged, since his initial hire as a federal employees on January 27, 2002.

Answer: Defendant denies paragraph 18. Defendant denies that plaintiff has been subject to discrimination by defendant based on race and/or gender. In addition, defendant denies that class certification is proper for this action under Rule 23 of the Federal Rules of Civil Procedure; specifically, Defendant denies that numerosity, commonality, and typicality exist within this purported class of persons described in the complaint, as required by Rule 23. Defendant also denies that this purported class will be adequately represented by plaintiff, as required by Rule 23.

19. The class that Plaintiff, as a class member, seeks to certify satisfies the numerously, commonality, typically, and adequacy of representation prerequisites for certification under Fed. R. Civ. P. 23(a).

Answer: Defendant denies paragraph 19 of the complaint.

20. Numerosity, Fed. R. Civ. P. 23(a) (1): The members of the class identified in Paragraph 7 above are so numerous that joinder of all members is impracticable. Given the fact that Defendant sought, and is continuing to seek, employment of individuals from the general population for its Region 3 office, and the fact that the class consists of current and former Black male employees and applicants (including out-side applicants), it is difficult to determine the exact number of Black males who have or had been affected by the discrimination. Even a good-faith approximation of the number could not be attempted, given the fact that the issue in this matter involves an estimated 31 years of race and sex discrimination against Black males. In other words, "the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all because some are not within the jurisdiction or because their whereabouts is unknown or where if all were made parties to the suit its continued

abatement by the death of some would prevent or unduly delay a decree."

Answer: Defendant denies paragraph 20 of the complaint in its entirety.

21. Commonality: Fed. R. Civ. P. 23 (a)(2): This suit poses numerous questions of law and fact that are common to and affect the rights of all members of the class. The answers to these questions will be determined on the basis of common evidence that is applicable to each class member. This includes the utilization of statistical evidence as proof of Defendant's pattern or practice and/or discriminatory policies, expert testimony, as well as testimonies from class members that may serve as anecdotal evidence above specific instances that also illustrate the persistent pattern or practice of race and sex discrimination against Black males.

Specific examples of factual and legal commonality include, but are not limited to:

a. Common Questions of Fact and Law. Claims of Plaintiff and each class member implicate common factual questions including (without limitations) the following:

1. Whether Defendant has subjected Black males, including Plaintiff, to a pattern or practice of race and sex discrimination at its Region 3 office;

2. Whether Defendant has followed hiring and promotion policies and an integrated practice of discrimination of disproportionately and purposefully excluding all, or substantially all, Black males, including Plaintiff, from Administrative, Professional, Supervisory, or Management positions on the basis of their race and sex at Region 3, which in turn implicates common questions concerning hiring and promotion; and

3. Whether Defendant has violated Title VII of the Civil Rights Act of 1964, as amended, and as alleged, under the disparate impact and disparate treatment theories, relating to whether Defendant's challenged pattern or practice and/or discriminatory policies that adversely affect Black males, including Plaintiff, can be justified as a "business necessity", and whether Defendant can provide "a nondiscriminatory explanation for the apparently discriminatory result."

b. The presence of central questions of fact and law that are common to Plaintiff and to each class member satisfies Rule 23(a) (2)'s commonality requiremen

Answer: Defendant denies paragraph 21, including subparagraphs, in its entirety.

22. Typicality: Fed. R. Civ. P. 23(a)(3): Plaintiff s claims are typical of the claims of the class members as a whole. Plaintiff possess the same interest and suffers the same inquiry as the class members. Plaintiff and class members share a common interest in equal employment opportunities without discrimination on the basis on our race and sex and suffer the same injury in deprivation of equal employment opportunities on the basis of our race and sex. The claims of Plaintiff and the class arise out of common facts and similar legal and remedial theories. The relief Plaintiff seeks will benefit the class. Plaintiff and class members also share a common interest in assuring that Defendant ends its unlawful employment discrimination against Black males at its Region 3 office. This shared interest in remedying a shared inquiry through similar legal and remedial theories satisfies the typical requirement of Rule 23 (a)(3).

Answer: Defendant denies paragraph 22 of the complaint in its entirety.

23. Adequacy of Representation: Fed. R. Civ. P. 23(a)(4): Plaintiff, or if represented by class counsel pursuant to Fed. R. Civ. 23 (g), will fairly and adequately protect the interest of the class. Plaintiff s interest and injury are coextensive with those of the class. Plaintiff seeks to end and remedy Defendant's pattern or practice and/or discriminatory policies so that the class will no longer suffer discrimination. Plaintiff is able and willing to represent the class fairly and vigorously as Plaintiff pursues this common goal through this action, and hereby states and there are no conflicts of interest between Plaintiff and the class. The coextensive interest and injury of Plaintiff with class members, along with the interest, resource, and trial experience of their class counsel to litigate competently this class action suit of race and sex discrimination at issue here, satisfy the adequacy requirement of Rule 23(a)(4).

Answer: Defendant denies paragraph 23 of the complaint in its entirety.

24. Federal R. Civ. P. 23(b)(2): Defendant has acted or refused to act in a manner generally applicable to the class. As indicated in paragraphs I through 6 above, and without limitations: Defendant has maintained a pattern or practice and/or discriminatory policies of treating Black males,

including Plaintiff, less favorable than white males. Defendant's pattern or practice and/or discriminatory policies have resulted in a hierarchy dominated exclusively by white males with little or no employment opportunity for Black males, including Plaintiff. Defendant's system of decision-making has resulted in a disparate treatment of, and has resulted in a disparate impact on, Plaintiff and the class as a whole. These continuing pattern or practice and/or discriminatory policies are common to and typical of the claims of Plaintiff and class members and satisfy Rule 23(b)(2)'s requirement that Defendant has acted in a manner generally applicable to the class.

Answer: Defendant denies paragraph 24 of the complaint in its entirety.

25. Fed. R. Civ. P. 23(b)(2): The Appropriateness of Injunctive and Declaratory Relief to the Class. Plaintiff seeks declaratory relief that Defendant's pattern or practice and/or discriminatory policies, as alleged, violate federal law; and injunctive relief designed to end and remedy the effect of the Defendant's pattern or practice and/or discriminatory policies. Such relief by its nature is applicable to the class as a whole and satisfies Rule 23

(b)(2)'s requirement that injunctive and declaratory relief be appropriate.

Answer: Defendant denies that it has engaged in discrimination and therefore denies that injunctive or declaratory relief is appropriate in this case.

26. Fed. R. Civ. P. 23(b)(3) Requirements: Class certification is also appropriate pursuant to Fed. R. Civ. P. 23 (b)(3) in this case because, as set forth in more detail in paragraphs above, common questions predominate over those affecting class members individually, and a class action is superior to other available methods of resolving this controversy. The alternative to class treatment is certainly numerous individual suits. Such a multiplicity of actions would defeat the economies of scale inherent in the class action procedure and result in substantial waste of judicial resources. Thus, from the viewpoint of public policy, transactional costs and judicial economy, multiple litigations would be manifestly inferior to a class action, thereby satisfying Fed. R. Civ. P. 23 (b)(3).

Answer: Defendant denies paragraph 26 of the complaint in its entirety.

27. A trial by jury is hereby demanded in this action for all issues triable by right.

Answer: Defendant admits that plaintiff demands a jury trial.

28. Wherefore, Plaintiff on own behalf and on behalf of the class members whom he seeks to represent requests the following relief:

a. Appointment of class counsel pursuant to Fed. R. Civ. 23 (g).

b. Certification of the case as a class action pursuant to Fed. R. Civ. P. 23 (b)(2) and/ or 23 (b)(3) on behalf of the Plaintiff s class and designation of Plaintiff as representative of the class and their counsel, if counsel is appointed by Court pursuant to Fed. R. Civ. 23 (g), of record as Class Counsel.

c. A declaratory judgment that Defendant's pattern or practice and/or discriminatory policies against Plaintiff and the class are unlawful and in violation of Title VII of the Civil Rights Act of 1964, as amended.

d. An award of back pay; interest on back pay; front pay; damages for lost compensation and job benefits that the Plaintiff and the class he seeks to represent would have received but for Defendant's discrimination; and

compensatory damages and such other and further relief as appropriate.

e. An order enjoining Defendant from engaging in each of the proven discriminatory policies/practices against Plaintiff and the class, and requiring Defendant to institute and carry out policies, practices and programs for its Region 3 office that remedy the effect of past and present unlawful employment practices. An order prohibiting Defendant and its Region 3 office from retaliating, in any forms, against Plaintiff or any of Plaintiff s class members. Teamsters v. United States, 431 U.S. 324 (1977) and Griggs v. Duke Power Co. 401 U.S. 424 (1971).

f. Reasonable attorney and expert witness fees and costs and expense of suit.

Answer: Defendant denies that any legal or factual basis exists of this court to appoint counsel to represent this purported class when the class has not been certified and no counsel who could adequately represent the class has come forward requesting appointment. Defendant denies that class certification is appropriate. Defendant denies that the other relief sough is appropriate in this case.

Respectfully submitted,

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